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Vol 3185

No. 17,762 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

PAUL JOHN CARBO, et al.,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellants,</i>
	<i>Appellee.</i>

APPELLANT GIBSON'S OPENING BRIEF

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FILED

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No. 17,762

IN THE

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For the Ninth Circuit**

PAUL JOHN CARBO, et al.,	} <i>Appellants,</i>
VS.	
UNITED STATES OF AMERICA,	

APPELLANT GIBSON'S OPENING BRIEF

STATEMENT DISCLOSING BASIS OF JURISDICTION

On or about September 22, 1959, a special grand jury in the Southern District of California returned an indictment against Truman Gibson, Jr., and four other persons (Tr. I, 2-16).¹ Though the indictment contained ten counts Mr. Gibson was charged in only two, Counts One and Five. Count One charged all defendants, and one William Daly who was not indicted, with conspiring willfully to obstruct, delay and affect interstate commerce by means of extortion

¹Reference is to the volume and page of the Transcript of Record which is in six volumes. The Reporter's Transcript of Proceedings will be referred to as "R. Tr." followed by the page number.

in violation of the Hobbes Act, 18 U.S.C. § 1951. Count Five charged all defendants and Daly with conspiring, willfully and with intent to extort, to transmit threats in interstate commerce in violation of 18 U.S.C. §§ 371 and 875(b). In other respects there is no material difference between Counts One and Five and all of the means and overt acts alleged in Count Five, save one of the latter, are repetitions of the allegations in Count One. In the other eight counts of the indictment the other defendants, except one, were charged with one or more substantive violations of the same statutes.

The cause was assigned to the Honorable Ernest A. Tolin, then one of the judges of the United States District Court for the Southern District of California and all of the proceedings to the time of his death were conducted by him.

On October 9, 1959, Mr. Gibson entered a plea of not guilty as to each of Counts One and Five with leave granted to him to file a motion to dismiss and other motions thereafter (Tr. I, 61).

A motion on behalf of Mr. Gibson to dismiss the indictment (Tr. I, 77-78), supported by a memorandum brief (Tr. I, 79-126), was filed. A motion for a bill of particulars (Tr. I, 152-153), and a motion for a separate trial based on the joinder of eight substantive counts in the indictment in which Mr. Gibson was not named with two conspiracy counts in which he was (Tr. I, 192-193) were also filed. All of these motions were denied (Tr. I, 210).

The court thereupon set the matter for trial on December 8, 1959. On motion of one or another of the parties, including the prosecution, the date for trial was continued from time to time to February 21, 1961.

On February 9, 1961, there was filed on behalf of Mr. Gibson a second motion to dismiss the indictment based on the conduct of the prosecution (Tr. II, 416-425). On February 16, 1961, the prosecution filed a motion to strike that motion to dismiss and an opposition thereto supported by certain affidavits (Tr. II, 446-472). Hearing on that motion to dismiss was begun on February 20, 1961, and was continued to the afternoon of the same day for taking evidence on the motion. In the afternoon the court refused to receive any evidence and denied the motion to dismiss with leave to raise the questions presented at another time (Tr. II, 474, R.T. 17-19).

The trial commenced on February 21, 1961, and continued from day to day before Judge Tolin, to May 30, 1961, when the jury returned verdicts of guilty as to all defendants on all counts (Tr. IV, 951-961).

Post-trial motions for a new trial (Tr. IV, 968-972) and for judgment of acquittal (Tr. IV, 973-974) were filed on behalf of Mr. Gibson on June 2, 1961, and were set for hearing on July 20, 1961 (Tr. IV, 980). In addition to being based on matters involved in the conduct of the trial these motions incorporated by reference the earlier two motions to dismiss in-

cluding the issues of the motion to dismiss which the court had refused to hear on February 20, 1961. In accordance with leave of court obtained, memorandum and points of authority in support of these motions were filed on June 26, 1961 (Tr. IV, 1088-1108).

On June 11, 1961, Judge Tolin passed away. On June 19, 1961, a supplemental motion for new trial was filed on behalf of Mr. Gibson based on the ground that a successor judge could not provide substantial justice and due process of law in passing on the pending post-trial motions (Tr. IV, 988-997).

On June 26, 1961, the Honorable George H. Boldt, United States District Judge for the Western District of Washington being generally assigned to sit in the Southern District of California was assigned this cause (Tr. IV, 1094). On July 24, 1961, Judge Boldt heard oral argument in support of the post-trial motions. The prosecution again moved to strike those portions of the motions to dismiss based on the conduct of the prosecution and charged defense counsel with misconduct (Tr. V, 1208-1213; R. Tr. 7983). At the direction of the court (Tr. V, 1323), counsel for Mr. Gibson filed a response to the prosecution's motion (Tr. V, 1220-1255).

On October 16, 1961, Judge Boldt denied the supplemental motion for new trial (Tr. VI, 1312-1314). Similarly, on November 29, 1961, Judge Boldt filed a memorandum finding that there was no prejudicial error in the conduct of the trial and set the matter for December 2, 1961 (Tr. VI, 1446). On that latter

date Judge Boldt sentenced Mr. Gibson to five years each on Counts One and Five with a fine of \$10,000.00 on Count One, the sentence to be concurrent and imposition of imprisonment only suspended and placed him on probation for five years subject to the usual conditions and that the fine imposed be paid promptly (Tr. VI, 1500).

With respect to the motion based on the conduct of the prosecution and the prosecution's motion to strike a portion of that motion, the court first refused to pass on the matter prior to entry of sentence and then after the entry of sentence the court concluded that the matter had become moot, that he found no misconduct on the part of the defense counsel and declined to act on the prosecution's motion to strike (Tr. VI, 1491).

Notice of appeal on behalf of Mr. Gibson was filed on December 4, 1961 (Tr. IV, 1521-1524).

THE FACTS

Truman K. Gibson, Jr., is and has been for many years a resident of the City of Chicago, County of Cook, State of Illinois and a citizen of the State of Illinois and the United States (R.T. 4289). He is married and the father of one child. Following his graduation from the University of Chicago Law School in 1935 he was admitted to the bar of the State of Illinois in the same year and he continues to be a member of that bar (R. Tr. 4289). From 1935

to 1940 he engaged in the practice of law in the City of Chicago. In 1940 he was appointed Assistant Civilian Aide to the Secretary of War and in 1941 was appointed Civilian Aide to the Secretary of War charged with the duty and responsibility of advising the Secretary of War and the Assistant Secretary of War on matters concerning Negro troops and Negro civilian personnel of the War Department (R. Tr. 4290). He continued in that post until the conclusion of the war with Japan in 1945 and for those services he was awarded the Medal for Merit. Thereafter he resumed the practice of law in the City of Chicago (R. Tr. 4290).

In 1949 Mr. Gibson became associated as Secretary with the then newly formed International Boxing Club of New York and the International Boxing Club of Illinois (R. Tr. 4289-4290). The business of the International Boxing Clubs was the promotion of fights in arenas owned by those promotional companies or affiliated corporations, and arrangement for the presentation of televised boxing bouts on Wednesday and Friday nights in those arenas and others throughout the United States (R. Tr. 4290). The producer of the Friday night fights telecast over the National Broadcasting Company television and radio networks was the Maxon Advertising Agency, a New York corporation not otherwise affiliated with the International Boxing Clubs. Mr. Gibson had no interest in the Maxon Agency. The American Broadcasting Company telecast the Wednesday night fights which were produced by Lester M. Malitz, Inc., and

neither Mr. Gibson nor the International Boxing Clubs or any of their affiliates owned any stock in that producing company (R. Tr. 4297).

Each of the television contracts was a 52 week contract except for years in which Christmas or New Year's Day fell on Wednesday or Friday (R. Tr. 4298). Thus IBC was responsible for putting on at least 102 and probably 104 main events for television each year. For each of the main events promoted directly by IBC, about half of the annual total, those companies also were obliged to arrange supporting cards of from three to five bouts. In more than ten years of operation, IBC never failed to produce a fight to meet its television obligations and the outcome of no such fight was ever predetermined or "fixed" (R. Tr. 4766, 4780).

The production costs to the sponsors of the Wednesday night fights ran from seventy-five to eighty thousand dollars per week, and as high as one hundred fifteen thousand dollars per week to the sponsors of the Friday night fights (R. Tr. 4307-4308). The International Boxing Clubs received a weekly fee from each series of approximately twenty thousand dollars per week to cover their costs of operation and arrangements with local promoters and fighters. Each contestant in a main event was paid a minimum of four thousand dollars, and each fighter in a semi-final bout was paid fifteen hundred dollars (R. Tr. 4307-4308). On telecast bouts originating outside New York or Chicago, the promoter in whose club the bout was held would receive a minimum of four thousand

dollars in addition to the amounts paid to the fighters (R. Tr. 4308). Amounts paid for world championship matches and other outstanding contests were determined by negotiation between IBC, the producers, sponsors and networks (R. Tr. 3873). Advances by IBC to fighters, managers and other promoters was a characteristic of the business. The total of such advances outstanding at any time ranged from one hundred and seventy-five thousand dollars to two hundred and seventy-five thousand dollars (R. Tr. 5288).

The producers had the power and authority to approve or reject the site of scheduled fights both because of financial and technical considerations arising from the feasibility of telecasting and the cost and availability of necessary telephone lines and television equipment. Basically, fights had to be arranged roughly eight weeks in advance and it was the responsibility of IBC to provide a substitute if for any reason a scheduled fight could not be held (R. Tr. 3877-3878). All fights scheduled had to be approved by the state commission of the state in which the fight was held (R. Tr. 4324).

The stock of the International Boxing Club of New York was wholly owned by the Madison Square Garden Corporation (R. Tr. 4291). The stock of the International Boxing Club of Illinois was owned by Mr. Arthur M. Wirtz and Mr. James D. Norris, Chicago businessmen and owners of the Chicago Stadium, or corporations that they owned and controlled (R. Tr. 4291). Mr. Gibson owned no stock in either of the International Boxing Clubs and except

for a few shares of Madison Square Garden Corporation stock which he owned for about six months in 1948, he never owned stock in any company affiliated with either the International Boxing Clubs, Chicago Stadium Corporation or the Madison Square Garden Corporation (R. Tr. 4290-4291).

The affairs of the International Boxing Club of New York were under the direction of its Board of Directors consisting of four persons, General John Reed Kilpatrick, long-time President of Madison Square Garden Corporation, Ned Irish, Executive Vice-President of Madison Square Garden Corporation, Mr. James D. Norris and Mr. Gibson (R. Tr. 4305). In 1958, Mr. Norris was replaced on that board by Mr. Francis Heazell, treasurer of the Knights of Columbus (R. Tr. 4305).

The International Boxing Club of Illinois was under the direction of a board of directors consisting of Mr. Wirtz, Mr. Norris and Mr. Gibson (R. Tr. 4305).

Mr. Gibson ran the Wednesday night fights from Chicago arranging most of the matches for television himself and supervising a matchmaker who arranged the supporting cards, and he was responsible for overseeing the New York operation where there was a matchmaker, assistant matchmaker and a managing director (R. Tr. 4298). A single main event would necessitate consideration of at least four or six opponents and managers and discussions with and about them (R. Tr. 4300). In the course of arrang-

ing these bouts Mr. Gibson carried on from four to five hundred conversations per year with fight managers and promoters throughout the country, mostly by telephone. He maintained an office at Madison Square Garden in New York where he spent about four days per week, and another office in the Chicago Stadium (R. Tr. 4299).

In performance of his duties Mr. Gibson was directly responsible to each of these boards and he reported daily to Mr. Norris who was a member of both boards and to Mr. Irish, then executive vice-president of Madison Square Garden (R. Tr. 4307).

In 1958, when Mr. Norris had a heart attack and resigned as president of the two International Boxing Clubs, the boards of directors of the two parent companies, the Chicago Stadium Company and the Madison Square Garden Corporation named Mr. Gibson as president (R. Tr. 5290). At that time the board of Madison Square Garden Corporation was composed of General John Reed Kilpatrick, chairman; Mr. Arthur M. Wirtz, vice chairman; Mr. Ned Irish; Mr. Francis Heazell, treasurer of the Knights of Columbus; Mr. Daniel R. Topping, president of the New York Yankees; Mr. J. Arthur Friedlund, secretary and counsel for the New York Yankees; Mr. William H. Burke, vice-president, Chicago Stadium Corporation; and Mr. August Bush (R. Tr. 5291, 5300). The board of directors of the Chicago Stadium Corporation was composed of Mr. Arthur M. Wirtz; his son William; Mr. James D. Norris; and Mr. Charles E. Dwyer (R. Tr. 5292).

In the performance of his duties, Mr. Gibson was responsible to these boards of directors respectively and he was required to make, and did make, reports to these directors at regular intervals; monthly in the case of the Madison Square Garden Corporation which was listed on the New York Stock Exchange and was therefore obliged to hold regular monthly meetings, and more frequently to Mr. Norris and Mr. Wirtz in connection with the activities of the Chicago Stadium Corporation and the International Boxing Club of Illinois (R. Tr. 5293). The books and records of all of these enterprises were regularly kept in the ordinary course of business, were regularly audited and the auditors made regular reports to the several boards (R. Tr. 4306).

Throughout his association with these enterprises Mr. Gibson was a salaried employee with no proprietary interest in them (R. Tr. 5287). Similarly, he never had any interest in any fighter or managerial contract with any fighter (R. Tr. 4326).

In addition to his business activities with these firms, Mr. Gibson maintained a private law office in Chicago and served as a member of the board of directors of Supreme Life Insurance Company of Chicago, and on the boards of various other business, social and philanthropic organizations. It stands uncontradicted that his character and reputation for truth and veracity are excellent (R. Tr. 5147, 5282, 5303, 5311).

In connection with his activities with boxing promotions Mr. Gibson met and dealt with hundreds of

fight managers, fighters, promoters, matchmakers, sports writers, and state boxing commission officials and employees throughout the United States. Among these were Jack Leonard who when Mr. Gibson first met him was Assistant matchmaker at the Hollywood Legion Stadium in Los Angeles (R. Tr. 4294). Leonard subsequently became matchmaker at the same club (R. Tr. 4294). Similarly Mr. Gibson met and dealt with Don Nesselth, manager of record of Don Jordan, and Jackie McCoy, himself once a fighter and later a second, assistant matchmaker, and co-manager with Don Nesselth of Don Jordan (R. Tr. 4477-4478). Under the law of California a licensed matchmaker was prohibited from serving as manager of a fighter, but McCoy did, and Leonard regularly engaged in negotiation of matches for Don Jordan (R. Tr. 4476).

The Hollywood Legion Stadium owned by the American Legion Post of that city had been a well-known and popular boxing club for many years operated by the Post (R. Tr. 4320). Early in 1958, however, financial difficulties led the Hollywood Legion Post to decide to abandon its promotion of boxing (R. Tr. 4313-4314). At that time Jack Leonard approached Mr. Gibson and urged him to arrange to have the promotional enterprises with which he was connected take over the operation of the Hollywood Legion Stadium. Mr. Gibson informed Leonard that he and his associates were not interested in the direct promotion of boxing in the Hollywood Legion Stadium but he arranged for a telecast origination

from the Stadium in order to help alleviate the financial difficulties (R. Tr. 4314).

Reluctant to see this popular, much-publicized club lost to the sport of boxing, Mr. Gibson discussed the matter with George Parnassus, long-time matchmaker of the Olympic Boxing Club, another Los Angeles fight promoter, and William Daly a long-time fight manager and an official of the Boxing Managers Guild who had close personal and business contacts with Mr. Edward Underwood, Chairman of the Board of the Hollywood Legion Post (R. Tr. 4315-4318). Other discussions with Jack Leonard and representatives of the California Athletic Commission followed, and in October, 1958 the International Boxing Clubs agreed to advance \$28,000 for a lease deposit of \$25,000 on the Hollywood Legion Stadium and working capital to a corporation to be formed by Jack Leonard with all of the stock to be owned by him. In addition, George Parnassus advanced \$10,000 (R. Tr. 4329). That organization, designated the Hollywood Boxing and Wrestling Club, began to promote boxing in the Stadium under Leonard's direction and supervision in November 1958 (R. Tr. 4330).

It was understood that Leonard was to rely upon the advice and assistance of Parnassus in promotional activities, and in order to conserve the limited funds of the enterprise, no major expenditures were to be made without notice to Mr. Gibson, although his signature was not required on checks drawn on the bank account of the Hollywood Boxing and Wrestling Club (R. Tr. 4332-4333). The money advanced

by IBC was to be repaid from the promoter's share of television originations from the Hollywood Legion Stadium.

Almost immediately the Hollywood Boxing and Wrestling Club encountered financial difficulties and Leonard became actively involved in controversy with Parnassus (R. Tr. 4370). By early 1959, the situation had become acute. The Legion Post was threatening to terminate the lease on the premises for non-payment of rent and cancellation of the performance bond of the club, required by the California Commission, was threatened (R. Tr. 4595-4596). Leonard's promises to pledge the stock of the club to secure the advances had not been kept. Parnassus demanded repayment of his advances. Mr. Gibson made numerous calls to Los Angeles and several trips there in an effort to bolster the flagging operation. He arranged for Leonard to borrow \$10,000 from one Ladell Tucker to repay Parnassus; he persuaded the Hollywood Legion Post to provide collateral security for the required performance bond by Leonard and he initiated discussions looking to a business combination of the Olympic Boxing Club and the Hollywood Boxing and Wrestling Club with its principals, Cal and Eileen Eaton, and Mr. Jamie K. Smith, one of the members of the California Athletic Commission (R. Tr. 4600-4606). Similarly, he asked William Daly to go to Los Angeles in May, 1959, to investigate the operation of the Hollywood Boxing and Wrestling Club and to determine what actions, if any, could be taken to improve its operations (R. Tr. 4660). At the

same time Mr. Gibson pressed Leonard and his attorney, Mr. Kenneth Lynch, to execute the necessary documents to evidence the debt of the Hollywood Boxing and Wrestling Club for advances and to pledge the stock of the club as security as had been promised (R. Tr. 4668).

In December, 1958 Leonard raised with Mr. Gibson the possibility of a telecast of a fight to be held in Porterville, California, in connection with a sports day affair being planned in that community (R. Tr. 4553). Gibson undertook to make necessary inquiries of the producer as to the feasibility of a Porterville origination on or about April 15, 1959 (R. Tr. 4560). In January, 1959 Leonard and Gibson discussed Gaspar Ortega and one of the Moyers from Portland, Oregon as possible contestants. Leonard was to promote the fight as an individual. He was to receive the customary four thousand dollar minimum promoter's fee plus two thousand dollars from the local sponsoring group, or a total of six thousand dollars (R. Tr. 4561).

Early in February, 1959, Leonard called Mr. Gibson in New York to inquire about the proposed Porterville fight. Mr. Gibson told Leonard that an answer had not yet been received from Mr. Malitz, the producer. Leonard said he was anxious to get the matter settled so that he could get an advance of eighteen hundred dollars on the promoter's fee to pay Palermo money Leonard said he owed him (R. Tr. 4563-4567). Gibson told Leonard he could not arrange for an advance on a Wednesday night from New York

because that series was run from Chicago. A few days later Leonard called Mr. Gibson in Chicago and he agreed to make the requested advance against the proposed Porterville fight, and he drew the requisite voucher for issuance of a check to Leonard in the desired amount (R. Tr. 4568-4573).

Two days later Leonard called Mr. Gibson in Miami, Florida to inquire about the check. Gibson told him he assumed that it had been mailed and that Leonard should receive it in a day or two. Leonard then asked Gibson to so inform Ogilvie, the Hollywood Boxing and Wrestling Club bookkeeper, and to authorize him to issue a check of that organization to Leonard so he could cover a bank overdraft and replace the money when the Chicago Stadium check arrived. Gibson did so (R. Tr. 4573-4575).

Subsequently, Malitz refused to approve the Porterville fight because of the costs and difficulties of arranging a telecast there (R. Tr. 3892-3893). Both Leonard and Nesselth were angry and dissatisfied when Malitz communicated his decision to them in mid-March, 1959 (R. Tr. 3894-3895).

Meanwhile, as early as August, 1958, Mr. Gibson had sought to arrange a bout for the world's welterweight championship to be telecast on the Friday night series in early December with one of the managers of the then welterweight champion, Virgil Akins (R. Tr. 4443). He was managed by Bernie Glickman of Chicago and Eddie Yawitz of St. Louis. No opponent had been selected nor had the site of

the bout been determined and, of course, no contracts had been signed (R. Tr. 4443). In October, however, the Olympic Boxing Club promoted a welterweight bout between Gaspar Ortega and Don Jordan at Long Beach, California. With the approval of the California Athletic Commission the bout was billed as an elimination for the right to fight for the welterweight championship (R. Tr. 4454). Don Jordan was the winner and the day after the fight Mr. Gibson began negotiations with Leonard, Nesseth and McCoy for an Akins-Jordan fight for the championship to be held on December 5, 1958, in Los Angeles, under the promotion of the Olympic Boxing Club (R. Tr. 4453). In the course of that conference Leonard told Mr. Gibson that Palermo, one of the other defendants, said there would be no fight unless he, Palermo, got a part of the manager's share of Jordan's purse (R. Tr. 4473).

Mr. Gibson had known Palermo through his activities in the boxing business as manager of a number of fighters including several world's champions (R. Tr. 4364-4365). Mr. Gibson informed Leonard, Nesseth and McCoy that Palermo had nothing to do with the matter and that if they wanted a championship fight for Jordan they could have it (R. Tr. 4473). Later the same day Mr. Gibson met with Leonard, his lawyer Lynch, one James Ogilvie, an employee of the Hollywood Legion Stadium, and Parnassus to complete their plans for Leonard's organization of the Hollywood Boxing and Wrestling Club (R. Tr. 4432).

Jordan fought Akins and won the title from him. Under the terms of the original contract for the first Akins-Jordan fight, Akins was promised a rematch in the event that he was the loser, with the site of the bout to be St. Louis, Akins' home town (R. Tr. 4352).

In January, 1959 Jordan fought one Alvaro Gutierrez in a non-title match under the promotion of the Olympic Boxing Club (R. Tr. 4338). The bout was not telecast. The IBC had no contract with the promotion. About that time Mr. Gibson learned that Don Nesselth was threatening to refuse to go through with the return bout with Akins. Another conference in Los Angeles between Leonard, Nesselth, McCoy and Gibson ensued (R. Tr. 4347-4348). By dint of agreeing to pay the transportation for six persons from Los Angeles to St. Louis for Nesselth and to make an advance of \$2,500, Mr. Gibson persuaded Nesselth and Leonard to perform on their promise of a return match for Akins with Jordan (R. Tr. 4352).

That return bout was finally held in St. Louis on April 25, 1959, under the promotion of Sam Muchnick (R. Tr. 4613). By this time, pursuant to a court order, the International Boxing Clubs of New York and Illinois had been severed. Mr. Gibson had become head of the Boxing Division of the Chicago Stadium Corporation and had terminated his connections with the New York promotional activities. The Chicago Stadium Corporation had no connection with the second Akins-Jordan fight. It was telecast by ar-

rangement of Madison Square Garden with which, by then, Mr. Gibson had no connection (R. Tr. 4613).

A few days later Mr. Gibson learned that fighters had not been paid transportation in connection with a telecast fight at the Hollywood Legion Stadium and that there was a report that Nesseseth had entered into an agreement with one Cus D'Amato, under the terms of which Nesseseth was turning control of his fighters over to D'Amato. D'Amato was, and is, the manager of Floyd Patterson, heavyweight champion of the world (R. Tr. 4622). Though Mr. D'Amato had been indebted to the International Boxing Clubs for advances in the amount of \$26,000 for some years he had consistently refused to permit Patterson to fight under the promotion of the International Boxing Clubs. Mr. Gibson called Leonard long distance about these matters and made arrangements to meet with Nesseseth to discuss the matter in Chicago on May 2, 1959. Nesseseth did not keep that engagement. Instead, on May 3, 1959, Leonard and Nesseseth called Mr. Gibson by telephone and told him that they were being threatened by Palermo who was in Los Angeles and asked Mr. Gibson to make Palermo leave Los Angeles. Mr. Gibson told them that he had no control over Palermo and if they were being threatened by anyone they should "run, not walk" to the nearest law enforcement officers (R. Tr. 4635-4641).

About ten days later Mr. Gibson was subpoenaed to appear before the California Athletic Commission to testify with respect to these matters. He appeared and did so testify (R. Tr. 4673).

Similarly, after the indictment involved here was returned, Mr. Gibson made a statement of several hundred pages to the United States Attorney in the Southern District of California (R. Tr. 4673-4674). Likewise he appeared before the Kefauver Committee of the United States Senate in December, 1960, and testified at length concerning his activities in the boxing business.

Mr. Gibson never knew, saw or heard of Joseph Sica or Louis Tom Dragna prior to the return of this indictment (R. Tr. 4678-4679). Mr. Gibson had met Frank Carbo shortly after Mr. Gibson became associated with International Boxing Clubs. Over an eight or nine year period he had talked to him on only a few occasions usually by telephone and had not talked to him at all from about the spring of 1958 until after the hearing before the California Athletic Commission in May of 1959 (R. Tr. 4755-4757).

Neville Advertising Agency, a corporation in which Mr. Gibson had no interest but which was affiliated with the International Boxing Clubs made payments of approximately \$40,000 to Mrs. Carbo between 1954 to 1957. These payments were made at the direction of Mr. Norris but Mr. Gibson knew of them. Likewise similar payments were made to Jack Kearns, an old-time fight manager. The payments were made to avoid antagonizing managers and fighters friendly to Carbo or Kearns. The payments were duly recorded, taxes were deducted, and no effort was made to conceal the fact that they were made (R. Tr. 4763-4767).

Mr. Gibson never made any threats of any kind, economically or otherwise, to Jack Leonard, Don Nesselth or anyone else (R. Tr. 4679). He never personally profited from any part of the purses of Don Jordan or any other fighter (R. Tr. 4677). He discontinued his connection with the boxing business in the fall of 1960 when the Boxing Division of the Chicago Stadium Corporation was dissolved.

ABSTRACT OF THE STATEMENT OF THE CASE PRESENTING QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED

Appellant's contentions on this appeal involve the failure of Count One of the indictment to state a public offense, the insufficiency of the allegations of Count Five as to venue, and the insufficiency of the evidence to sustain a conviction as to those counts, issues which were raised by timely motions to dismiss and by motions for judgment of acquittal.

There is also a claim of denial of a fair trial for various reasons all of which issues were raised by timely objections, motions to strike, motions for judgment of acquittal and motion and supplemental motion for new trial.

SPECIFICATIONS OF ERRORS RELIED UPON

1. The evidence is insufficient to sustain a conviction as to Counts One and Five of the indictment.

2. Neither Count One nor Count Five of the indictment sufficiently alleges a federal offense.

3. The court erred in denying the motion of appellant for a dismissal as to Counts One and Five of the indictment at the close of the prosecution's case.

4. The court erred in admitting into evidence and in denying appellant's motion to strike all of those matters specified in that motion (Tr. 784).

5. The court erred in failing to provide appellant a fair, impartial and speedy trial.

6. The court erred in finding that a successor judge could satisfactorily perform post-verdict duties.

7. The court erred in denying appellant's motion for judgment of acquittal.

ARGUMENT OF CASE**SUMMARY**

Counts One and Five of the indictment are fatally defective. Count One does not allege a federal offense because it contains no allegations as to effect on interstate commerce. Count Five does not contain required

allegations as to venue because the termini of the alleged communications are not alleged. Both counts are vague and indefinite.

The evidence as to appellant fails to prove beyond a reasonable doubt that he was a party to any conspiracy as alleged in Count One. There is no evidence to support the conviction of appellant as to Count Five.

The form of the indictment, misjoinder of defendants, conduct of the prosecution, conduct of the trial and post-verdict action by a successor judge combined to deny appellant a fair trial in violation of rights protected by the Constitution of the United States.

A. DEFECTS IN THE INDICTMENT

Counts I and V of the indictment (Tr. 17) are set forth in full in an Appendix to this brief. Each of those counts is fatally defective. Count I failed to allege an offense cognizable as a matter of law in the courts of the United States. Each count is so vague and indefinite that it fails to satisfy the requirements of Rule 7 of the Federal Rules of Criminal Procedure. Finally, Count V does not contain the requisite allegations as to venue.

1. Count I Does Not Allege a Federal Offense.

Count I of the indictment charges that Mr. Gibson and others, in violation of Title 18, § 1951, U.S.C., conspired to obstruct interstate commerce by means of extortion from Nesselth and Leonard of a share of

the fight purses of Don Jordan and control of the same fighter. Both the legislative history and the judicial decisions construing that statute, commonly known as the Hobbes Act, make it clear that in adopting it Congress was exercising its power under the Constitution of the United States to deal with interstate commerce. It is equally clear that the statute was intended to deter and punish illicit use, and threats of illicit use, of union strength against employers for the personal gain of labor leaders with the inevitable resulting burden on interstate commerce if such commerce was involved in the particular situation. *United States v. Green*, 350 U.S. 415 (1956).

The relationship between Nesseth and Leonard on one hand, and Don Jordan on the other, whatever it was (and the indictment is silent on the matter), is not interstate commerce nor is the purse of a single fighter interstate commerce.

In *United States v. International Boxing Clubs*, 348 U.S. 236, 240 (1955), the Court ruled that the promotion of professional boxing contests on a multi-state basis, coupled with sale of rights to televise, broadcast and film the contest for interstate transmission, constituted "trade or commerce among the several states" within the meaning of the Sherman Act. The Court then pointed out, however:

"A boxing match—like the showing of a motion picture . . . or the performance of a vaudeville act . . . or the performance of a legitimate stage attraction . . . 'is of course a local affair.' But

that fact alone does not bar application of the Sherman Act to a business based on the promotion of such matches, if the business itself engaged in interstate commerce, or if the business imposes illegal restraints on interstate commerce. Apart from *Federal Baseball and Toolson*, it would be sufficient, we believe, to rest on the allegation that over 25% of the revenue from championship boxing is derived from interstate operations through the sale of radio, television, and motion picture rights."

In this case the indictment contains no such allegations as the Court found necessary in the *International Boxing Club Case*. It was these allegations which served to distinguish *Toolson v. New York Yankees*, 346 U.S. 356 (1953), and *Federal Baseball Club v. National League*, 259 U.S. 200 (1922). In the *Toolson Case*, by *per curiam* opinion the Court squarely held that the validity of contracts between baseball players and their respective employers is outside the scope of federal jurisdiction, relying upon a similar view as to the relationship between major leagues in the *Federal Baseball Case*.

Equally significant, in *Shall v. Henry*, 211 F.2d 227 (C.A. 7th, 1954), the Court held that a licensed manager of a boxer could not bring an action under the Sherman Act for treble damages against the co-managers in various boxing groups because the business of presenting boxing matches did not constitute interstate commerce finding no distinction between a baseball game and a boxing match, relying upon the cited decisions of the United States Supreme Court. Sig-

nificantly, the *Shall* Case was called to the attention of the Supreme Court in the *International Boxing Club* Case and it was not overruled or distinguished. See 348 U.S. 236, 242.

In light of these precedents we respectfully submit that it is clear that a contract between one fighter and his manager or managers does not constitute interstate commerce. Accordingly, Count I is fatally defective because there is no other allegation which can be construed as describing any matter in interstate commerce.

2. Vagueness and Indefiniteness of Counts I and V.

Rule 7(c) of the Federal Rules of Criminal Procedure provides: "The indictment . . . shall be a plain, concise and definite statement of the essential facts constituting the offense charged." Although Rule 7 relaxed many of the technical requirements formerly imposed as to indictments, it re-expressed the fundamental requirement that an indictment must plainly and definitely charge every essential element of the offense charged. Thus Rule 7 codified the requirement well recognized ever since the decision in *United States v. Cruikshank*, 92 U.S. 542, where the Supreme Court said:

"The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged so that it may de-

cide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.”

The failures of Counts I and V to satisfy these requirements are numerous. Count I fails to allege any facts showing how interstate commerce was to be delayed, obstructed or affected by the alleged conspiracy. Count I likewise fails to allege how threats directed to Nesselth and Leonard could accomplish the object of the conspiracy even if its object were to obstruct interstate commerce since there is no allegation of the relationship, if any, between Nesselth, Leonard and Jordan, and no allegation as to the rights of Nesselth or Leonard to control Jordan or share his purses. Trial and verdict cannot cure these defects, nor can inference or innuendo cure this count. This is particularly true because in California the whole matter of relationship between fighters and managers is controlled by state law. See Calif. Code, Division 8, Ch. 2, Business and Professions Code, as added by Stats. 1941, Ch. 45 as amended §§18674 and 18682 and rules adopted by the Athletic Commission of California in accordance therewith.

Similarly Count V fails to allege what agency of interstate commerce, if any, was to be used to convey the alleged threats and there is no allegation as to the points between which the threats were to be communicated. See, e.g., *Asgill v. United States*, 60 F.2d

780 (C.A. 4th 1932), and *United States v. Grunberg*, 131 Fed. 137 (C.A. 1st 1904), where the Court enunciated this long-standing rule in the following language:

“According to the settled practice on indictments for conspiracy, whether the means to be employed are in themselves lawful or unlawful, it is not sufficient to merely allege in such general terms that the defendants have conspired to defraud. The indictment must allege, to some extent at least, the means intended to be used in defrauding.”

As this Court pointed out in *Elder v. United States*, 142 F. 2d 199 (C.A. 9th, 1944):

“An indictment is a formal accusation of a person charging that he has committed an illegal act which is denounced by the sovereign as a crime. It must indicate the crime charged, and it must contain a statement of the essential elements of the indicated crime. It must include a recital of the acts alleged to constitute the offense in detail sufficient to bring them within the scope of the offense and sufficient to inform the accused generally of the acts attributed to him and the time of their commission, so that he may be safeguarded against double jeopardy.”

When the vague generalizations contained in both Counts I and V of this indictment are considered alone or against the background of the trial it is apparent that neither count satisfies fundamental legal requirements.

3. Count Five Does Not Contain the Requisite Allegations as to Venue.

It has been uniformly held that the requisite venue must be both alleged and approved by the Government, because the Sixth Amendment to the Constitution of the United States guarantees to the accused the absolute right to a public trial by an impartial jury of the state and district wherein the offense is alleged to have been committed. *United States v. Dean*, 246 F. 2d 335 (8th Cir.); *United States v. Provo*, 215 F. 2d 531 (2nd Cir.). Under Article Third of the Constitution of the United States, the Congress has the authority to define the jurisdiction, including venue, of the inferior Federal courts. From time to time, the Congress has exercised this authority by adoption of venue statutes of general applicability and by the adoption of venue statutes applicable with respect to particular offenses.

One such statute is applicable here. That is 18 U.S.C. § 3239. It provides:

“Any defendant indicted under sections 875, 876 or 877 of this title, with respect to communications originating in the United States, shall, upon motion duly made, be entitled as of right to be tried in the district in which the matter mailed or otherwise transmitted was first set in motion, in the mails or in commerce between the States.”

Though Count V purports to be under both Sections 371 and 875 of Title 18 U.S.C., the gravamen of the offense charged is violation of Section 875 because without that section and without the charge

that there was an agreement of the defendants to violate that section, there could be no violation of Section 371 because there would be no agreement to violate a law of the United States. Accordingly, Mr. Gibson is a "defendant indicted under Section 875".

Section 3239 specifically provides to any such defendant the absolute right to be tried in the district in which the interstate communication "was first set in motion". Thus, application of the customary requirement that venue must be alleged by the Government and proved, when applied to this case, necessarily means that the Government must allege the place in which the interstate communication "was first set in motion".

Even a casual examination of Count Five shows that it does not satisfy this statutory requirement. Instead, in paragraph 4 of Count Five the Government has alleged only that, "to effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County, California, within the Central Division of the Southern District of California *and in other places.*" (Emphasis supplied) The same paragraph continues by specifying five telephone calls between defendants Palermo and Carbo and Leonard. There is no allegation with respect to any telephone call by Mr. Gibson. More significantly, there is no allegation as to either of the termini of such telephone calls. Indeed, there is not even an allegation that these telephone calls were interstate communications.

The ordinary reading of the English language requires that paragraph 4 of Count Five be construed to mean that one or more of the specified calls was initiated or completed in Los Angeles County. The form of the allegations, however, precludes any determination as to which of such calls this is true. Even more important, the phrase "and in other places" cannot properly be read as referring only to other than California, and in any event the right guaranteed by Section 3239 with respect to the place of trial of an indictment under Section 875 cannot possibly be satisfied because of the absence of allegations with respect to the place where the communications relied upon by the Government were "first set in motion".

Trying Mr. Gibson on an indictment so lacking in the requisite allegations as to the venue denied to him both the rights guaranteed by the Sixth Amendment, and in light of the explicit provisions of 18 U.S.C. § 3239, and the due process of law required by the Fifth Amendment to the Constitution of the United States.

The Government may argue that because of the provisions of 18 U.S.C. § 3237, venue may be laid in either the district where an offense is begun or where it is terminated if more than one district is involved. See *United States v. Smith*, 92 F. 2d 460 (C.A. 9th 1937). That section has no applicability here, however, because that section explicitly states its rule shall apply "except where otherwise expressly provided by an enactment of Congress . . ." Obviously,

Congress has “otherwise expressly provided” in Title 18 § 3239 quoted hereinbefore.

Similarly, the Government may argue that Section 3239 does not apply because Count Five charges a conspiracy and that venue, therefore, may be laid either in the district where the alleged illegal agreement is alleged to have been made or in a district where it is alleged one or more overt acts in furtherance of the agreement were committed. But Count Five charges violation of both Sections 371 and 875(b) of Title 18. Section 3239 applies to “*any* defendant indicted under Section 875 . . .” (emphasis supplied). Count Five demonstrates that Mr. Gibson was so indicted. Accordingly, venue should have been alleged in accordance with the requirements of Section 3239 to satisfy the requirement of criminal pleading in the courts of the United States.

B. THE INSUFFICIENCY OF THE EVIDENCE

1. As to Count I.

Count I of the indictment charges Mr. Gibson and others with conspiring to obstruct interstate commerce by means of extortion from Nesseth and Leonard of a share of the fight purses of Don Jordan and control of that fighter. But the prosecution failed to prove beyond a reasonable doubt that Mr. Gibson was a party to any such agreement. In fact, the verdict was based on innuendo, invective, outright perjury, testimony about the conduct of some of the other de-

fendants outside the presence of Mr. Gibson, not known to him prior to the trial, and references to Mr. Gibson in conversations outside his presence between some of the defendants and prosecution witnesses and others. Certainly there was no direct evidence that Mr. Gibson was part of any conspiracy, as charged or otherwise, and what there is cannot be described as circumstantial evidence because it will not support, logically, the inference that he was a party to any such agreement.

What the record does show, without contradiction, is that at all of the times material hereto Mr. Gibson was engaged in carrying out his duties as a salaried employee of the International Boxing Clubs of New York and Illinois, or the successor of the latter, the Boxing Division of the Chicago Stadium Corporation. These duties were being carried out under the direction and supervision of the responsible corporate officers and in accordance with the policies fixed and determined by those officers. At all of the times material hereto, and for some years prior thereto, these companies had been engaged in the business of promoting professional boxing matches and, subject to the authority of promoters, sponsors and networks, as well as state athletic commissions, making such boxing matches available for telecasting at the rate of more than one hundred fights per year.

In the course of carrying out these duties Mr. Gibson necessarily had telephonic and personal contact with all of the other persons engaged in the boxing

business whether they were of high or low degree. He necessarily was in communication with managers, fighters, other promoters, sports writers, state athletic commissioners and their staffs, and any other persons connected in one way or another with professional boxing. Significantly, in this regard, it stands uncontradicted that prior to this trial Mr. Gibson never knew or heard of either Joseph Sica or Louis Tom Dragna. His contacts with Mr. Carbo over a period of more than ten years were limited to a few isolated conversations unrelated to the subject matter of this cause. The payments to Mrs. Carbo, all duly recorded in corporate books and records, were made at the direction of Mr. Norris, then president of the International Boxing Clubs. Even those payments terminated prior to the events involved here and there is no evidence that these payments were either unlawful or illegal or were anything other than the exercise of business judgment as to the best way to maintain working relationships with certain fighters and managers whose skill and services were necessary to the promotion of more than one hundred boxing matches per year.

Mr. Gibson's contacts with Palermo plainly arose from, and were limited to, Palermo's long activities as a manager of many fighters, some of them champions and others outstanding in their weight classes. None of this is contradicted by any evidence tendered by the prosecution. It is striking, if not determinative, that the prosecution offered no witnesses to contradict any of this. Indeed, with respect to most of

these matters the prosecution did not even cross-examine the witnesses concerning them, e.g., witnesses Wirtz and Malitz, (R. Tr. 3902-3907, 5303).

Basically the prosecution depends upon the testimony of Jack Leonard, Don Nesselth and Jackie McCoy. Even taken as wholly true, which it was not, that testimony could not support an inference that Mr. Gibson was party to any conspiracy. Leonard testified that on or about October 23, 1958, when he, Nesselth and McCoy, were negotiating with Mr. Gibson for a championship fight for Don Jordan with Virgil Akins, he, Leonard, told Mr. Gibson that Palermo said that unless he got a part of the managers' share of the earnings of Don Jordan there would be no championship fight. Leonard further testified that Gibson said that was "ridiculous" and that it "is unreasonable. Nobody does things like that, about taking money out of your fighters."

Leonard also testified that when he said he feared violence if he did not accede to Palermo's demands, Mr. Gibson told him "that stuff went out with high button shoes", (R. Tr. 603-604). Leonard then testified that though Nesselth, the manager of record of Jordan, refused to accede to any such demands, Mr. Gibson told him, Leonard, to agree to them and he, Gibson, would straighten the matter out when he got back to Chicago. Later, Leonard testified that Mr. Gibson assured him and kept assuring him "that if there was any finances involved, any money to be involved, he would take care of it, he would pay it", (R. Tr. 618).

This testimony would hardly warrant the inference that Mr. Gibson was a party to an agreement with Palermo or any one else to take money from Leonard or Nesseth. It would indeed be a strange and weird distortion of legal principles to suggest that Mr. Gibson was a party to an agreement to extort money from himself. The real fact, of course, is that no such promise was ever made and no suggestion made by Mr. Gibson that Leonard agree to Palermo's alleged demands.

Later events relied upon by the prosecution are even more inconsistent with the charges in the indictment. Leonard sought, and Mr. Gibson arranged for, an Eighteen Hundred Dollar advance to Leonard in connection with a fight which Leonard proposed to promote in Porterville. Advances to managers, promoters, and fighters are an integral part of the method by which boxing matches are promoted and staged. For example, Mr. Gibson made an advance of Twenty-Five Hundred Dollars to Donald Nesseth about which Nesseth lied. Mr. Wirtz testified that outstanding advances by the International Boxing Clubs at any given time ranged from One Hundred Seventy-Five Thousand to Two Hundred Seventy-Five Thousand Dollars. The Porterville advance was regularly and duly made and recorded in the corporate books and records. The prosecution, however, contends that this advance to Leonard corroborates Leonard's version of the promises alleged to have been made by Mr. Gibson apparently failing to recognize that the only basis for denying the wholly corroborated character of the ad-

vance is Leonard's unsupported testimony. Thus the prosecution seeks to corroborate an admitted liar by another lie by the same liar.

It is doubtful whether the credibility of any witness was ever so badly battered as was the credibility of Jack Leonard. Much of the attack on his credibility came from the prosecution. In its opening statement the prosecution asserted that Leonard had made inconsistent statements prior to the trial (R. Tr. 350). The prosecution was right. In its closing argument the prosecution conceded that, using his wife, Leonard had attempted, after the return of this indictment, to extort Twenty-Five Thousand Dollars from Mr. Palermo not to testify in the trial. Similarly, there was uncontradicted evidence of an effort by Leonard to extort an equal amount from Joseph Sica. Every witness, including one submitted by the prosecution, who knew Leonard testified as to his generally bad reputation as to truth and veracity. In fact, the prosecution itself had so little confidence in Leonard's capacity for truth that he was not submitted as a rebuttal witness though practically every part of his testimony was contradicted over and over again by prosecution witnesses, defense witnesses and defendants.

What the evidence does show without contradiction about Mr. Gibson is that with the approval of his business associates he was responsible for the International Boxing Clubs advancing Twenty-Eight Thousand Dollars to Jack Leonard in a vain effort to set him up in business as a fight promoter. The uncontradicted evidence also shows that Leonard sought to

manipulate affairs to evade his obvious debt to the International Boxing Clubs. The evidence also stands uncontradicted that Mr. Gibson further sought to aid Leonard by arranging a loan from Mr. Tucker for Ten Thousand Dollars for Leonard, again in an effort to assist Mr. Leonard in his business. The evidence stands uncontradicted that Mr. Gibson persuaded the Hollywood Legion Post to provide collateral security for a performance bond for Jack Leonard, all in an effort to keep him in business as a fight promoter. None of these efforts succeeded.

From this vantage point one may question the business acuity of Mr. Gibson in his reliance upon Leonard. But the conduct of Mr. Gibson certainly does not warrant the inference that he was part of a conspiracy to victimize Leonard. Actually with one exception, the check to Mr. Palermo, the evidence in this record with respect to the transfer of funds shows that all of the funds flowed in only one direction, that is to Jack Leonard. It is not only the credibility of Leonard which is shattered. His admitted business relationships with Mr. Gibson make it clear that there was a motive, and a malicious one at that, for his testimonial effort to involve Mr. Gibson. Leonard took and squandered the International Boxing Clubs' funds. Time was running out on him and he chose to attack his creditors rather than to attempt to repay them.

None of the prosecution evidence is consistent with the charge against Mr. Gibson. Prosecution proof of the meeting between Leonard and Palermo in Miami, carefully concealed from Mr. Gibson, is hardly con-

sistent with the charge of conspiracy between Mr. Gibson and any of the persons involved here. Similarly, the recorded conversations, all outside the presence of Mr. Gibson, show that Leonard and Nesseth, as well as Palermo, knew Mr. Gibson was no part of any conspiracy. The May 3 telephone conversation between Leonard and Nesseth and Mr. Gibson, when they claimed that they were being threatened, dispels the last wisp of the prosecution's contentions. It was Mr. Gibson who advised Leonard and Nesseth to "run, not walk" to the nearest law enforcement officers. That, we respectfully submit completely negates any intention on the part of Mr. Gibson to extort anything from anybody. Equally significant, it does not appear that either Leonard or Nesseth was so "frightened" that either had sought the protection of the law prior to Mr. Gibson's advice.

Finally, there is no evidence of any "economic coercion" exerted on Leonard by Mr. Gibson. Actually, all of the evidence is to the contrary.

We recognize that there has been a verdict of guilty returned as to Mr. Gibson and that this Court is limited in its review of the evidence, but we respectfully call to the Court's attention the observations of the late Mr. Justice Jackson with respect to the trial of a conspiracy case. He said in *Krulewitch v. United States*, 336 U.S. 440, 453-454 (1949):

* * * *

"When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie

the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U.S. 535, 559, 68 S. Ct. 248, 257, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 2 Cir., 167 F. 2d 54.

The trial of a conspiracy charge doubtless imposes a heavy burden on the prosecution, but it is an especially difficult situation for the defendant.

* * * *

A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. * * *''

Mr. Justice Jackson might well have been speaking of this very case. But it is fundamental that a charge of conspiracy cannot be sustained unless it is proved beyond a reasonable doubt that there was an agree-

ment by the particular defendants to commit the specified offense against the United States. *Ingram v. United States*, 360 U.S. 672, 677-678 (1959); *Pereira v. United States*, 347 U.S. 1, 12 (1953); *Krulewitch v. United States*, 336 U.S. 440, 443-444, 452-458 (1949); *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).

To demonstrate a conspiracy to commit a particular substantive offense the prosecution must prove beyond a reasonable doubt at least the extent of criminal intent which would have to have been shown to demonstrate the commission of the substantive offense itself. *Ingram v. United States*, supra.

Even if the prosecution proved beyond a reasonable doubt knowledge on the part of a defendant of wrongdoing by others or an agreement between others to commit an offense, that would not be sufficient to convict that defendant as a party to any such agreement. *Ingram v. United States*, supra; *Krulewitch v. United States*, supra; *Goodman v. United States*, 128 F. 2d 854 (C.A. 9th 1942); *United States v. Falcone*, 109 F. 2d 579 (C.A. 2d 1940); *Muyres v. United States*, 89 F. 2d 784 (C.A. 9th 1937).

In the instant case we respectfully submit that the evidence as to Mr. Gibson falls far short of satisfying these well established minimums to sustain a conviction for conspiracy. Accordingly we urge this Court to reverse his conviction.

2. As to Count V.

Count V charges Mr. Gibson and others with conspiring to transmit in interstate commerce communications, threats to injure Leonard and Nesseth with intent to extort a share of the management of Don Jordan. There is no evidence of any agreement on the part of Mr. Gibson with any one to transmit threats in interstate commerce or otherwise. On the contrary, even the evidence of the prosecution shows clearly Gibson's marked and instantaneous negative reaction to suggestions of violence and his advice to seek the aid of law enforcement officers. Ironically, all of the evidence with respect to interstate communication so far as Mr. Gibson is concerned shows on his part a vigorous and determined effort to use the facilities of interstate communications, telephonic and otherwise, to further his business of promoting and telecasting boxing matches. At no point in the record is there the slightest suggestion of any intent on the part of Mr. Gibson to threaten any one with physical violence or economic pressure or any thing else. Thus as to Count V there is no evidence upon which the conviction could be sustained.

C. DENIAL OF FAIR TRIAL

1. Form of the Indictment.

The vagueness and indefiniteness of Counts I and V of the indictment have been discussed hereinbefore. That argument will not be repeated here. Since Counts I and V of the indictment were insufficient

and indefinite to apprise the defendant of the charges brought against him so as to enable him to prepare a defense, it necessarily follows that the defendant could not have been afforded a fair trial.

In addition, both Counts I and V contain the following allegations:

“It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators’ demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators’ said demands.”

As has already been pointed out hereinbefore it stands uncontradicted in the record that Mr. Gibson never knew or heard of Joseph Sica and Louis Tom Dragna prior to the return of this indictment. Thus, there was a fatal variance in proof on the trial. Equally important, the allegations as to “underworld reputations” are so vague and indefinite and so prejudicial to Mr. Gibson that to compel him to go to trial on such an indictment, to permit the indictment to be read to the jury as it was done, and to permit the jury to have a copy of the indictment during its deliberations, as was done, was to prejudice Mr. Gibson and to deny a fair trial to him.

Vague generalities as to reputation as the basis of criminal prosecution have always been condemned by

the courts. See *Lanzetta v. U. S.*, 306 U.S. 451 (1939). In this case the prejudice to Mr. Gibson was compounded by the Court's allowing the prosecution, over objections to cross-examine Mr. Gibson about "the underworld" without defining the term. Indeed, the prosecution refused to obey a direct charge by the Court to define the term. This Court's attention to this whole colloquy is invited. It is set forth in the Appendix hereto. We respectfully submit that this alone would be sufficient to demonstrate that Mr. Gibson was denied a fair trial.

2. Misjoinder.

In this case Mr. Gibson was joined as party defendant not only with the other defendants accused of conspiracy in Counts I and V but also with defendants who were accused of substantive offenses in eight other Counts alleged to have been committed in connection with the same matters which were the subject of the conspiracy indictment. It must be conceded that the joinder of the defendant and charges is a matter of judicial discretion. Under the circumstances in this case, however, the joinder of Mr. Gibson with the other defendants was so prejudicial as to amount to an abuse of judicial discretion and a denial to Mr. Gibson of a fair trial. As a matter of fact the evils so classically described by Mr. Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 443-445, quoted hereinbefore, were accentuated in this case by reason of this misjoinder. In this connection the court's attention is respectfully directed to *Schaeffer v. United States*, 362 U.S. 511, 516, 1960. A fair trial,

we submit, was impossible for Mr. Gibson after motion for severance was denied.

3. Conduct of the Prosecution.

The zeal of advocacy has long been a characteristic of Anglo-American litigation. Far from being an object of condemnation it may well be a mark of professional competence. This is true whether the advocate represents the prosecution or the defense. There are, however, well-recognized, if not specifically defined, limits beyond which the most zealous advocate should not proceed. In this case, we respectfully submit, the prosecution exceeded allowable bounds.

To begin with, prior to the trial, representatives of the prosecution took a statement of several hundred pages from Mr. Gibson with the promise that this statement would be considered in determining whether to proceed with the indictment against him. The taking of that statement, which took place over five or six days was concluded in June, 1960. A few days later the prosecution moved for a long continuance of the matter but failed to serve a copy of the notice of motion on counsel for Mr. Gibson. Instead a copy was served on Mr. Gibson himself by mail and then by long distance telephone one of the prosecutors informed Mr. Gibson that he need not be concerned about the motion for continuance because, on the basis of his statement, the matter would be dismissed as to him.

About a month later a representative of the prosecution assured counsel for the defendant, informally,

that the prosecution would not proceed against Mr. Gibson. Despite repeated inquiries by counsel for the defense between June and late November, 1960, no final answer as to the prosecution's decision with respect to the matter could be secured. When formal inquiry was made of the Department of Justice in Washington concerning the matter early in January, 1961, prior assertions by representatives of the prosecution were repudiated.

A motion to dismiss based on these matters was filed to bring the matter to the attention of the Court immediately prior to the trial (Tr. 461). The prosecution filed affidavits admitting some of the allegations made by the defense but denying others (Tr. 446). When the defense offered to produce witnesses in support of the motion the trial judge first agreed to hear them. Later on the same day when the witnesses had been subpoenaed, the trial judge refused to hear them and denied the motion to dismiss but gave leave to the defense to renew the matter at an appropriate time, perhaps on motion for judgment of acquittal.

Following the verdict that motion to dismiss was incorporated as a part of the post-trial motion for judgment of acquittal (Tr. 973). As before, the prosecution filed affidavits concerning the matter (Tr. 1208 and 1211), and this time charged defense counsel with misconduct. Defense counsel were directed by the successor judge to file a response (R. Tr. 7983). This was done under oath at the end of July, 1961 (Tr. 1220). The prosecution filed additional affidavits shortly thereafter (Tr. 1300). The successor judge

took no action on the matter until after he had entered final judgment and sentence on December 2, 1961. Then he found that defense counsel were guilty of no misconduct and decided that the matter was moot.

We concede the right, and indeed the duty, of the prosecution to proceed with an indictment. We respectfully submit, however, that the prosecution had no right to mislead Mr. Gibson as to its intentions. Certainly the prosecution had the power to dismiss the indictment as to him if it elected to do so. See Rule 48, Federal Rules of Criminal Procedure. Equally certain the long delay and the reliance of Mr. Gibson on the assertions by the prosecution sorely hampered preparation of his defense and deprived him of a speedy trial. Most damaging to Mr. Gibson was the refusal of the trial Court to hear and determine the issue.

We have already called the Court's attention to the colloquy concerning the "underworld". This is an example of the type of examination which the Court permitted the prosecution to engage in despite objections of defense counsel. Equally serious, on closing argument, the trial judge emphatically forbade defense counsel to interrupt the prosecution even for the purpose of making objections (R. Tr. 6825-6826). Reasonable limitations of space will not permit detailed analysis of the extent to which the prosecution on closing argument distorted the evidence in a fashion which inevitably misled the jury. Finally, on its rebuttal argument, the prosecution raised and devoted a great

deal of time to two matters of argument which had not been referred to by the prosecution on its opening, though that had consumed more than seven hours, or by any defense counsel in argument. Defense counsel sought leave of Court to reply to these matters. That leave was denied (R. Tr. 7588-7589).

All of this conduct of the prosecution contributed to the denial of a fair trial to Mr. Gibson. See: *Berger v. United States*, 295 U.S. 78, 88 (1935); *Marks v. United States*, 260 F. 2d 377, 383 (C.A. 10th 1958); *Ross v. United States*, 180 F. 2d 160 (C.A. 6th 1960); *Pierce v. United States*, 86 F. 2d 949, 952 (C.A. 6th 1936).

4. Conduct of the Trial.

We respectfully submit that the conduct of the trial resulted in denial of a fair trial to Mr. Gibson in many respects. Among these were the method of selection of the jury, rulings on admissibility of evidence, the action of the court with respect to instructions, and the failure of the court to determine whether the prosecution had proved beyond a reasonable doubt that the conduct of Mr. Gibson complained of had any effect on interstate commerce.

(a) Selection of the Jury.

On behalf of Mr. Gibson a motion to quash the venire was made on the ground that he is a Negro and that there was a systematic exclusion of Negroes from the jury (R. Tr. 75). That motion was summarily overruled on the basis of what the trial judge

said he knew the facts to be and defense counsel was denied even an opportunity to make an effort of proof with respect to the matter. Instead the court itself called two witnesses to testify with respect to the method used to secure the venire (R. Tr. 90-96). Later (R. Tr. 4342-4346), the judge made a further statement as to his observations concerning service by Negroes on juries.

Discrimination against a race by barring or limiting citizens of that race from participation of jury service has long been onerous to American thought and the Constitution and laws of the United States, Title 18 U.S.C., § 243; *Cassell v. State of Texas*, 339 U.S. 282 (1950), and cases there cited. It was error to deny the offer of proof of systematic exclusion of Negroes from the venire. *Carter v. Texas*, 177 U.S. 442 (1900); *Goldsby v. Harpole*, 263 F. 2d 71 (C.A. 5th, 1959). The efforts by the judge himself to answer the motion to quash the venire were themselves improper. *Norris v. Alabama*, 294 U.S. 587, 588 (1935).

Actually what the efforts of the trial judge resulted in showing was that the methods used to select the panel were not in accordance with the requirements of the applicable statutory provisions, 28 U.S.C., § 1864. It is clear that the selection of names for the jury box is for the jury commissioner and the clerk of the court. It is equally clear that in the Southern District of California this practice is not followed.

The procedure used to select the jury from the panel also violated the applicable Rules. Rule 24 of

the Federal Rules of Criminal Procedure specifically provides that the defendants are jointly entitled to ten peremptory challenges and if there is more than one defendant the court may allow additional peremptory challenges. In this case the court allowed the defendants seventeen peremptories to be exercised jointly. The court allowed the prosecution ten peremptories. The court then required that the prosecution list its peremptories on a tally sheet provided and required that the defense do likewise without either side knowing what peremptory challenges had been made by the other. These two tally sheets were handed to the clerk who read off the first twelve names of jurors in the order of assignment of numbers not objected to by either side.

Three alternate jurors were chosen in the same fashion except that each side was allowed only one peremptory as to the alternates. This, despite the express provision of Rule 24(c) that each side is entitled to two peremptory challenges if two or three alternate jurors are to be impanelled.

We respectfully submit that this method does violence to the intendment of the Rules with respect to peremptory challenges. We suggest that the method followed does not assure the minimum number of peremptory challenges provided by the Rules.

For all of the foregoing reasons we respectfully submit that Mr. Gibson was denied the right of trial by jury required by the Seventh Amendment to the Constitution of the United States.

(b) Rulings on the Admissibility of Evidence.

At the outset of the trial the court instructed counsel that it would rather entertain a motion to strike at the close of the government's case than to pass on objections with respect to evidence offered as the trial proceeded (R. Tr. 412-413). Thereafter it is clear from the record that though from time to time objections were made on behalf of Mr. Gibson with respect to the relevancy of testimony or other evidence offered by the prosecution, the court did not consider the questions as to relevancy to this individual defendant. At the close of the prosecution's case a detailed motion to strike was filed on behalf of Mr. Gibson (Tr. 766). That motion was summarily denied despite the fact that the prosecution had not shown that Mr. Gibson was a party to the conspiracy charged. Indeed, it is doubtful that the court even considered the question seriously. By that time there had been admitted into evidence over the objections of counsel for Mr. Gibson testimony with respect to conversations outside his presence, conduct of other defendants not before known to him, and even testimony of conversations between persons not parties to the suit, particularly a recording of a conversation between one William Daly alleged to be a co-conspirator and not indicted, and Jack Leonard. There never was any evidence presented to show that Daly was a co-conspirator.

There was evidence, however, that Leonard, wired for sound by the Los Angeles Police Department, had gone to a hotel room occupied by Daly and proceeded to make a conversation with him. This the prosecu-

tion relied upon to corroborate Leonard's testimony in part. As a result there was the ridiculous and prejudicial situation that out-of-court statements by a prosecution witness, not made in the presence of Mr. Gibson, but in which he was mentioned, were admitted into evidence to corroborate the testimony of a prosecution witness who not only was available but who in fact testified at great length.

Similarly, recordings obtained by wire-tapping and other recordings of conversations outside the presence of Mr. Gibson, but in which he was mentioned, were admitted into evidence over his objection. The prejudice and harm to Mr. Gibson of admitting such evidence is demonstrated by the fact that after it retired, the jury, from this enormous record, asked for no reading of testimony and for no exhibits but the three recordings.

We adopt the argument of other defense counsel with respect to the impropriety of the admission of these recordings. We respectfully urge upon this Court, however, that the method used by the trial court in ruling on the admissibility of evidence in this case where both conspiracy and substantive counts were at issue was particularly erroneous and prejudicial to Mr. Gibson and, if no other reason were present, would require the reversal of his conviction.

(c) The Instructions.

We respectfully submit that in several particulars the action of the court with respect to instructions was so erroneous as to deny to Mr. Gibson a fair trial.

Though requested so to do the court did not apprise counsel of the instructions to be given prior to final argument. This, despite the explicit requirement of Rule 30 of the Federal Rules of Criminal Procedure. See *Ross v. United States*, 180 F. 2d 160 (C.A. 6th, 1950). This failure on the part of the court substantially prejudiced Mr. Gibson. See *Ross v. United States*, supra, and *United States v. Crescent-Kelvan Co.*, 164 F. 2d 582, 589 (C.A. 3rd 1948).

With respect to the instructions actually given or refused the court's action was equally prejudicial to Mr. Gibson. On his behalf, and it was not contradicted, substantial evidence was adduced as to his good character and excellent reputation for truth and veracity. It is clear that he was entitled to an instruction as to the effect of such evidence. Such an instruction was requested, Defendant Gibson's Instruction F which is set forth verbatim in the Appendix hereto. The trial judge indicated that he would give that instruction. Instead, he made a series of statements with respect to this matter which are also set forth verbatim in the Appendix hereto.

We respectfully submit that those remarks would not satisfy the requirements with respect to an instruction as to character evidence. The statements made by trial judge completely omitted informing the jury that "an established reputation for good character alone may create a reasonable doubt as to the defendant Gibson". This aspect of the matter is not only of prime importance but has long been recognized as the minimum to which a defendant of good

character is entitled. See 4 Barron, Federal Practice & Procedure, 246 and *Johnson v. United States*, 269 F. 2d 72, 74-75 (C.A. 10th 1959). We respectfully submit that in a case such as this where the credibility of the principal prosecution witness is attacked and where a defendant takes the stand and testifies at considerable length, and is subjected to long arduous cross-examination as was Mr. Gibson and where evidence of good character is uncontradicted, to deny to him an instruction fairly and correctly apprising the jury of the effect of such character evidence is to prejudice and harm Mr. Gibson to such an extent that the conviction should be set aside.

Defense counsel contended that the prosecution had offered evidence, particularly testimony of Jack Leonard, which the prosecution knew was false and misleading in material parts. It is well settled that if the prosecution so acts a conviction even based in part on such testimony cannot stand. See *Napue v. State of Illinois*, 360 U.S. 264 (1959), and cases there cited. At first when requested so to do the trial judge indicated that he would give such an instruction (R. Tr. 7434). Actually he refused so to do. Under these circumstances we respectfully submit Mr. Gibson was denied, to his prejudice, an instruction to which he had a right.

Similarly the instructions given with respect to the law of conspiracy did not conform to the requirements of the decisions of the Supreme Court of the United States. See *Ingram v. United States*, *supra*, and *Direct Sales v. United States*, *supra*. We adopt the

argument of other defense counsel as to the insufficiency and erroneous character of the instructions given on the law of conspiracy.

Similarly, not as part of the instructions, but after the jury had retired and when it returned to listen, at its own request, to the playing of one of the disputed recordings, the court made the following statement:

* * * *

“However, before you start in the jury should be cautioned that Mr. Daly is not a defendant here. The consideration by you of the Daly-Leonard conversation is only appropriate if you find from the evidence, using the standards that the court has previously told you, that Daly was either a conspirator, although he escaped indictment, or that he was an agent, that is, that he was one who was acting for one of the conspirators, if there were conspirators. It is for you to decide if there was a conspiracy.” (R. Tr. 7789.)

There was no opportunity for counsel to object to this statement and indeed if any objection had been made it would have unduly emphasized the statement.

It will be observed that the statement contains no definition of the term “agent”, and it ignores the fact that the indictment charged that Daly was a co-conspirator, though not indicted. This statement by the court was enormously prejudicial so far as Mr. Gibson is concerned in view of the fact that he had testified that Daly had participated with him and others in the discussions leading to the formation of the Hollywood Boxing and Wrestling Club and that,

because of Daly's close business and personal connections with Mr. Underwood of the Hollywood Legion Post, he, Mr. Gibson, had requested Mr. Daly to go to Los Angeles to help in solving the desperate business problems of the Hollywood Boxing and Wrestling Club in May, 1961.

We respectfully submit that this final action by the trial judge culminated the long series of deviations from accepted and standard practices in the United States district courts which characterized the trial of this case. Taken all together we respectfully submit they resulted in denial of a fair trial to Mr. Gibson.

(d) The failure of the Court to Find That Interstate Commerce Was Affected.

It has been uniformly held that in a prosecution under Title 18, § 1951, U.S.C., the court, and not the jury, must determine whether the prosecution has adduced evidence to demonstrate that the defendant's activities complained of affect interstate commerce so as to sustain federal jurisdiction, *United States v. Green*, 246 F. 2d 155 (C.A. 7th 1957); *United States v. Lowe*, 234 F. 2d 919 (C.A. 3rd 1956); and *Hulahan v. United States*, 214 F. 2d 441 (C.A. 6th 1954).

In this case the court never made any such finding. Instead the jury was told (R. Tr. 7659):

“If boxing matches are, in fact, televised and television is sent into other states, that brings it within the ambit of interstate commerce.”

We respectfully submit that this is not the law as has been shown hereinbefore in discussion of the fail-

ure in the indictment to allege matters showing an effect on interstate commerce.

5. The Effect of Action by a Successor Judge.

The late Honorable Ernest A. Tolin conducted all of the proceedings in this cause until the time of his death on or about June 11, 1961. At that time the verdict had been returned and post-trial motions for new trial and judgment of acquittal had been filed.

Thereafter Mr. Gibson, and other defendants, filed a supplemental motion for new trial on the ground that a successor judge could not provide substantial justice and due process of law in passing on the pending motions (Tr. 988). Those motions were all denied by the successor judge, the Honorable George H. Boldt, on October 16, 1961, (Tr. 1342). Rule 25 of the Federal Rules of Criminal Procedure provides for a successor judge, but "if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason he may in his discretion grant a new trial". The determination by a successor judge that he can perform the duties required after a verdict is reviewable on appeal, *Connelly v. United States*, 249 F. 2d 576 (C.A. 6th 1957). We respectfully submit that the determination by Judge Boldt in this case was an abuse of sound judicial discretion because of the fact and circumstances of this trial particularly with respect to Mr. Gibson.

The trial in this case began on February 21, 1961, and there were hearings before the Court on more than sixty days prior to the verdicts. The Reporter's

Transcript of Proceedings in this cause totals more than seventy-five hundred pages. In the course of the trial approximately ninety witnesses testified. Thirty-seven of these were offered by the prosecution on its direct case. More than thirty witnesses, including this defendant and three of the other defendants, testified for the defense. More than twenty witnesses were tendered by the prosecution in rebuttal. Approximately three hundred fifteen exhibits were marked and about three hundred of these were received in evidence.

Included among the exhibits admitted were a number of recordings of conversations alleged to have been had between various persons by telephone and otherwise. Mr. Gibson did not participate in any of these conversations. All of the recordings introduced by the prosecution were admitted over his objections. Six of these recordings were played in open court before the judge and jury. Three recordings offered by the prosecution including one not previously played were played for the jury in open court after it had retired to consider its verdicts. The playing of these recordings and the attendant proceedings both in and out of the presence of the jury took up at least twenty per cent of the time devoted to the trial. The Reporter's Transcript of Proceedings, however, contains no transcript of any of these recordings because it was the opinion of the trial judge that the reporter could not fairly transcribe from the reproduction of these recordings in the courtroom. Though what purported to be transcripts of some of the recordings were marked as exhibits, Judge Tolin refused to admit these pur-

ported transcripts in evidence in the absence of agreement by all counsel that such transcripts were correct. There was no such agreement.

No judgment had been entered in this cause by Judge Tolin prior to his death. Even more important, the post-verdict motions were pending. Those motions raised substantial and complex questions of both law and fact. Mr. Gibson contended then and does now that the evidence is not sufficient to support the verdicts as to him. There is a sharp conflict in the evidence in this cause with respect to Counts I and V of the indictment which are the only counts charging Mr. Gibson. Over repeated objections, prosecution evidence was admitted which had no application to Mr. Gibson and which was prejudicial and harmful to him. There is a substantial question as to the credibility of the principal witness for the prosecution, Leonard Blakely, alias Jack Leonard, and some of the matters derogatory to the credibility of this witness and another prosecution witness, Don Nesselth, were conceded and admitted by the prosecution. Even more important is the credibility of Mr. Gibson as a witness in light of the nature of the charges against him, the length and nature of his direct testimony and the cross-examination of him, and the uncontradicted evidence of his good character. It is respectfully submitted that one who has not observed the witnesses could not fairly resolve these issues.

The pending motions raised other issues which it is respectfully urged could not be fairly resolved by one who did not have the "feel of the case." These range

from the sufficiency of the indictment, the question of venue and the propriety of a joint trial through, but not limited to, the legality of the method of jury selection, the propriety of innumerable rulings on the admissibility of evidence, the propriety of the conduct of the prosecution before and during the trial and particularly in closing argument, on to the sufficiency of the instructions given and refused.

More delicate and more difficult to state is a question which arises from the medical history of Judge Tolin. His untimely demise immediately following a long and arduous trial and his long history of serious cardiac difficulties with the inevitable attending necessity for medication and restricted activities suggests that though he was an able and experienced judge, in the conduct of this trial he may have been unable to proceed with the required fairness and impartiality. Review of his conduct of this trial under these circumstances by a successor judge, it is respectfully submitted, is not likely to serve the interests of justice when "manifestly, the judge to whom such a proceeding is assigned because of the death of the trial judge, finds himself in a position of considerable delicacy, as he has to perform the somewhat invidious function of reviewing the rulings of a judge of co-ordinate jurisdiction. * * *." (*Miller v. Pennsylvania Railroad Co.*, 161 F. Supp. 633, 636 (D.C.D.C. 1960).

Where there is a substantial conflict in the evidence and the credibility of prosecution witnesses is a serious issue a successor judge cannot provide a fair trial to a defendant in passing on post-verdict motions and

in rendering sentence. *Connelly v. United States*, 249 F. 2d 576, 580-581 (C.A. 8th, 1957); *Brennan v. Crisco*, 198 F. 2d 532, 533 (C.A.D.C., 1952); *Federal Deposit Ins. Corp. v. Siraco*, 174 F. 2d 360, 363-4 (C.A. 2d, 1949); *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F. 2d 77, 80 (C.A. 2d, 1949); *Smith v. Dental Products Co.*, 168 F. 2d 516, 519 (C.A. 7th, 1948); *In re Linahan*, 138 F. 2d 650, 653-4 (C.A. 2d, 1943); 7 Moore Federal Practice (2d Ed. 1955) 1458.

Under all these circumstances we respectfully urge this Court to set aside the ruling of Judge Boldt and the conviction of Mr. Gibson.

CONCLUSION

The whole record in this case requires a reversal with dismissal as to Mr. Gibson with respect to both Counts I and V.

Dated, July 18, 1962.

Respectfully submitted,

LOREN MILLER

WILLIAM R. MING, JR.

*Attorneys for Appellant
Gibson.*

CERTIFICATE AS TO COMPLIANCE WITH RULES 18 AND 19
OF THE RULES OF THIS COURT.

Counsel for appellant hereby certify that they have examined the provisions of Rules 18 and 19 of this Court and in their opinion the tendered brief conforms to all requirements.

Dated, July 18, 1962.

LOREN MILLER

WILLIAM R. MING, JR.

*Attorneys for Appellant
Gibson.*

(Appendix Follows)

Appendix.

Appendix

COUNT ONE

(U.S.C., Title 18, Sec. 1951)

1. Prior to October 22, 1958, the exact date being unknown to the grand jury, and continuing to the date of this indictment, defendants Paul John Carbo, aka Frankie Carbo, Frank Palermo, aka Blinky Palermo, Joseph Sica, Louis Tom Dragna, Truman Gibson, Jr., unindicted co-conspirator William Daly, and divers other persons to your grand jury unknown, did agree, confederate and conspire to commit offenses against the United States as follows:

2. Willfully to obstruct, delay and affect interstate commerce by means of extortion, in violation of United States Code, Title 18, Section 1951.

3. The objects of such conspiracy were to be accomplished as follows:

a. The defendants Paul John Carbo and Frank Palermo, by use of threats of physical harm and violence and threats of economic loss and injury to the victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, were to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and to obtain control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of the victims Donald Paul Nesseth and Leonard Blakely without paying any consideration for the monies and control so received.

c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreements to the conspirators' said demands.

d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesseth and Leonard Blakely to accede to the demands of the conspirators for control of the prize fighter Don Jordan.

4. To effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County, California, within the Central Division of the Southern District of California, and in other places, as follows:

a. On or about October 23, 1958, defendant Frank Palermo had a conversation by telephone with Leonard Blakely.

b. On or about October 24, 1958, defendant Truman Gibson, Jr., had a conversation with Leonard Blakely, Donald Paul Nesseth and Jackie McCoy.

c. On or about December 30, 1958, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

d. On or about January 5, 1959, defendant Frank Palermo had a conversation with Leonard Blakely.

e. On or about January 5, 1959, defendant Paul John Carbo had a conversation with Leonard Blakely.

f. On or about January 27, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

g. On or about January 27, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

h. On or about April 22, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

i. On or about April 25, 1959, defendant Frank Palermo had a conversation with Donald Paul Nesseth in St. Louis, Missouri.

j. On or about April 25, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

k. On or about April 25, 1959, defendant Frank Palermo had a conversation with Sam Muchnick in St. Louis, Missouri.

l. On or about April 28, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

m. On or about April 28, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

n. On or about May 3, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

o. On or about May 4, 1959, defendant Joseph Sica had a telephone conversation with Leonard Blakely.

p. On or about May 5, 1959, defendants Frank Palermo and Louis Tom Dragna visited the Hollywood American Legion Stadium where Donald Paul Nesselth and Leonard Blakely were present.

q. On or about May 6, 1959, defendants Joseph Sica and Frank Palermo had a conversation with Leonard Blakely, Donald Paul Nesselth and Jackie McCoy.

r. On or about May 6, 1959, Joseph Sica had a telephone conversation with Manuel Dros.

s. On or about May 7, 1959, defendant Truman Gibson, Jr., had a telephone conversation with Leonard Blakely.

t. On or about May 11, 1959, defendant Truman Gibson, Jr., had a telephone conversation with Leonard Blakely.

u. On or about May 14, 1959, co-conspirator William Daly had a conversation with Leonard Blakely.

COUNT FIVE

(U.S.C., Title 18, Sec. 371, 875(b))

1. Prior to October 22, 1958, the exact date being unknown to the grand jury, and continuing to the date of this indictment, defendants Paul John Carbo aka Frankie Carbo, Frank Palermo, aka Blinky Palermo, Joseph Sica, Louis Tom Dragna, Truman Gibson, Jr., unindicted co-conspirator William Daly, and divers other persons to your grand jury unknown, did agree, confederate and conspire to commit offenses against the United States as follows:

2. Willfully and with intent to extort money and a thing of value, to wit, a share of the management of the prize fighter Don Jordan, from Leonard Blakely and Donald Paul Nesselth, to transmit in interstate commerce communications containing threats to injure the persons of Donald Paul Nesselth and Leonard Blakely in violation of Title 18, United States Code, Sections 371 and 875(b).

3. The objects of said conspiracy were to be accomplished as follows:

a. The defendants Paul John Carbo and Frank Palermo were to transmit interstate telephone communications containing threats of physical harm and violence and threats of economic loss and injury to victims Donald Paul Nesselth

and Leonard Blakely, aka Jackie Leonard, in an effort to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of victims Donald Paul Nesseth and Leonard Blakely without payment of consideration for the monies and control so received.

c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands.

d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and

and influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesselth and Leonard Blakely to accede to the demands of the conspirators for control of the prize fighter Don Jordan.

4. To effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County, California, within the Central Division of the Southern District of California and in other places, among which are the following:

a. On or about January 27, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

b. On or about January 27, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

c. On or about April 28, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

d. On or about April 28, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

e. On or about April 29, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

EXCERPT, REPORTER'S TRANSCRIPT OF RECORD
VOLUME 34, PAGES 5023-5050

Q. Mr. Gibson, did you participate in policy decisions of the International Boxing Club during the period you were a principal of that corporation?

A. I was never a principal in the corporation, Mr. Goldstein. I never owned any stock. I did participate in policy decisions while I was an officer.

Q. All right. Was it the policy of the International Boxing Club, during the time you were an officer, to use the underworld to the extent that you could in the operation of your business?

Mr. Ming. Well now, your Honor, I suggest that some weeks ago at the beginning of this trial somebody asked a question which you described as a foul question.

I should like to adopt your language. I should like to remind the court, in support of my objection, that there has been for several hundred years in the Anglo-American courts a rule that when on cross examination there is a suggestion of facts not in evidence, that it is incumbent upon the counsel who makes the assertion to adduce proof of the matter which he has referred to in his cross examination.

I will ask the court to sustain the objection which I am making and to ask the jury to ignore the question.

The Court. I do not adopt all of Mr. Ming's remarks. I do think the question was not a proper question.

Mr. Goldstein. Your Honor,—

The Court. You are only going to get one type of answer from a question of that type, and it leaves before the jury just the assertion of the prosecutor.

Mr. Goldstein. Your Honor, I have a foundation for asking that question. I ask it in good faith. If I can proceed I will show to your Honor——

The Court. You had better come to the side bar and tell me what your foundation is.

(Whereupon, from 11:50 o'clock a.m. to 12:03 o'clock p.m., the following proceedings were had at the bench, out of the hearing of the jury, with all counsel and defendants present:)

The Court. Defendants are now at the side bar with counsel.

You may proceed.

Mr. Goldstein. Your Honor please, the following questions and answers were asked of the defendant Gibson before the Kefauver Committee:

“Q. And was that policy that you finally decided on to cooperate with these underworld elements?

“A. No, not to cooperate, but to live with them.

“Q. Live with them?

“A. Yes.

“Q. Use them?

“A. To the extent that we could, but not be used by them.”

Further testimony:

“Q. In order to satisfy the sponsors——”

Well, before that:

“Q. Utilize them in order to supply fighters for your matches?

“A. No, it was normally negative. We never, except in a few cases—in the case of a few championships that Mr. Norris would know more about than I. What we wanted to do was to maintain a free flow of fighters without interference, without strikes, without sudden illnesses, without sudden postponements.”

Further on, the question is asked:

“Q. In order to satisfy the sponsors and have a free flow of fighters you decided to live with Carbo, is that right?

“A. We decided to live with Carbo, with the Managers Guild and with all the elements that were facts of life that we had to contend with.

“Q. But the most powerful elements were the underworld elements, were they not?

“A. I would not say that, no. I would say it was a factor to be considered.

“Q. And it was an important factor, was it not?

“A. An important factor, yes.”

Further on, the question is asked:

“Q. Mr. Gibson, you indicated that the International Boxing Club recognized the existence of this underworld influence. You found out you had to live with it, is that right? I believe those were your words, those were the facts of life?

“A. Yes.

“Q. And you had to live with it?

“A. Yes.

“Q. Could you explain to us what you meant ‘you had to live with it’? What did you have to do in order to go on living with it? Did you have to offer them any compensation, any type of arrangement?”

And there was an interruption and they recessed for lunch.

After the luncheon recess the Committee asked about the Carbo checks and the Palermo checks and other matters.

But I submit that the witness’ testimony to the effect that they used the underworld to the extent they could, but not be used by them, is ample foundation for the question I asked. I submit that it goes directly to the question of intent, to the very facts of this case, where Sica and Dragna were brought on to the scene here by the defendants and where the testimony is that these people had reputations of being members of the underworld.

Mr. Strong. Your Honor please, first of all, what Mr. Goldstein is doing is that he is trying his case, not against the defendants who have to be tried in a proceeding of this type—they are on trial—but against general terms. He starts off with a concept of the underworld.

Now, as far as I am concerned, there is absolutely no evidence here which indicates what is meant by

“the underworld”. Who is included in “the underworld”?

During the Civil War we used to have an underground railroad. Maybe some people think the underworld runs through on the underground railroad.

He is trying to create guilt here by associating general terms with persons on trial. The only way he has gotten reputation in this case is through the mouth of a man like Leonard who said he heard—and even with him it is hearsay—he said he heard something to the effect these people were part of the underworld, or words to that effect.

Whether Mr. Gibson did or did not testify that way before the Senate Committee is wholly immaterial. It can't be used as facts here. There is too nebulous a context. There is no tying in with the defendants. And to put that before the jury is highly prejudicial and wholly improper and deprives my client of a fair trial and due process of law.

The Court. It does tend to impeach the witness Gibson, does it not?

Mr. Ming. I suggest not, your Honor. What he is doing, in addition to all the things Mr. Strong has described, is endeavoring to raise irrelevancies under the guise of impeachment. There has been no testimony here by this witness as to which that is relevant.

Moreover, the question to which I objected has exactly the vice in it we pointed out. If you were to read, if you were to read, in addition to the portions Mr. Goldstein read, because he skipped around, it

would be perfectly clear that this colloquy between the two Senators who were present, and Mr. Bonomi and Mr. Gibson, was wholly outside the range of any rules of evidence that would be applicable in the United States District Court in the trial of a federal criminal case.

With those limitations not present, now to introduce this kind of material is, I suggest, your Honor, highly prejudicial to the defendant Gibson. It has nothing to do with impeaching.

Mr. Strong. May I add, your Honor, that I don't think you can create an issue for a jury to rule upon, even with relation to credibility of a witness, by asking him on cross examination some general questions about the underworld and then bringing in evidence to show he may have said something different or the same previously.

I think that is wholly improper. In the first place, it has no business here and to drag it out this way, to give the jury the opinion that what is being tried here is a case involving the underworld and, therefore, they should convict because of the general frightening terms and nebulous concept, but we are trying a case here against five individuals. I think this is highly improper and wholly deprives our clients, at least my client, of any due process.

If he could use it for impeaching purposes—There are some things that a court should keep out if they are so damaging, if they can't be separated from their proper and improper use, if a thing like that has an improper use, which is the use Mr. Goldstein

is using it for, and it should be kept out, even if by some possibility there is some relevance——

Mr. Ming. Let him point out what he is trying to impeach. I have been directed to do that at times. Let him point it out.

Mr. Bradley. I join in all the objection.

Mr. Parsons. Yes, I do too, on behalf of defendant Sica.

The Court. What are you seeking to impeach?

Mr. Goldstein. This is a direct element of the case. It goes directly——

The Court. But has Gibson testified on it?

Mr. Goldstein. He certainly has. He has testified to his state of mind in May of 19——let's see, in April and May of 1959, at the time he was on constant communication with the defendant Palermo.

There is in evidence, as a matter of fact, according to his testimony, three telephone calls with Palermo on May 4th and May 5th, and one of them to Palermo's George Tobias on the 5th, and on the 6th——

The Court. Evidence through him?

Mr. Goldstein. Yes. And on the 6th Palermo and Sica show up at the Hollywood Legion Stadium, and on the 5th Dragna and Palermo——on the 4th Dragna and Palermo were at the Hollywood Legion Stadium.

Mr. Strong. I ask your Honor this question: Would it be proper for anybody to ask this witness on the stand, "Is it your understanding that Mr. Palermo is a member of the underworld?"

Wouldn't you strike that out as a conclusion? If you can't ask it directly, I say to your Honor you

can't get it in indirectly in any fashion or form you propose.

There can't be such a characterization. It is a matter of opinion and consequently it wouldn't be proper evidence here. No matter how you get it in it is improper.

Mr. Parsons. May I say the defendant Sica joins in the remarks made by counsel and we object to any such question on the ground it is immaterial, irrelevant and incompetent, and hearsay as to Sica.

I want to point out, your Honor, that asking about the underworld is a nebulous thing and it is against the rules laid down in *Lansetti v. New Jersey*. It is so uncertain as to be undeterminable.

Mr. Beirne. I join in all the objections made by my colleagues and the classical objection that it is incompetent, irrelevant and immaterial, not proper cross examination, not within the issues of the case and hearsay. I assign the asking of the question as prejudicial misconduct and request the jury be instructed to disregard it.

Mr. Parsons. I join in that.

Mr. Strong. So do I.

Mr. Ming. There is nothing in the questions he read dealing with questions of fact. Mr. Gibson testified that he talked to Mr. Palermo on the telephone and he testified what he talked to Mr. Palermo about. There is nothing in that transcript that has anything to do with that. Certainly, it has nothing to do with the matter of the alleged conversation between Mr. Palermo or Mr. Dragna or Mr. Sica, or whoever it

was, so I would suggest, your Honor, this is an effort to bring in illegal fraudulent issues that couldn't be brought in by a witness. It is highly prejudicial to the defendant Gibson and would be a violation of his constitutional rights to a fair trial if the question is allowed to be answered.

Mr. Strong. May I make a further motion at this time, your Honor? I move now again for a mistrial on the ground we are not getting a fair trial according to the rules of law and due process.

The Court. The motion for mistrial is denied.

Mr. Bradley. I join in all the other motions and on the additional ground this is an attempt of impeachment on purely collateral matter of the issues at trial, under this indictment.

The Court. The court will rule on it after the noon recess. We have gone into the noon hour.

Now, Mr. Gibson, you are here with the other defendants at side bar. Just bear in mind the ruling of the court might be—I am not saying it will be—it might be you have to answer the question.

So we will recess until a quarter of 2:00.

(The following proceedings were had in the presence and hearing of the jury:)

The Court. Members of the jury, that side bar conference took us into the noon hour. So we will take the luncheon recess until 15 minutes before 2:00.

Bear in mind the admonition which I have given you at length before and keep your minds open. Be back at a quarter of 2:00 for resumption of the trial.

(Whereupon, at 12:04 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

Los Angeles, California, Friday, April 28, 1961, 1:52 P.M.

(Whereupon the following proceedings were had in open court in the presence and hearing of the jury:)

Truman K. Gibson, Jr.,

one of the defendants herein, resumed the witness stand on his own behalf, having been previously duly sworn, and testified further as follows:

The Court. The defendants are present; counsel here as before.

The objection to the pending question is overruled. However, Mr. Gibson may have a little latitude in answering it, beyond just straight inquiry, because there is a term in it which is subject to various definitions. Can you read it?

Mr. Parsons. I don't want to belabor the point, but, as to Mr. Sica it is hearsay, your Honor, and made long subsequent to, as you have heretofore explained.

The Court. Yes. Well, I hope my explanation will stand. This is being received purely by way of cross examination of the defendant Gibson and may be received only as to the defendant Gibson.

Mr. Ming. Your Honor, I will object on the ground that it is grossly improper, that it is outside of scope of direct examination, that it is vague and ambiguous and so vague and ambiguous that to permit the question to be asked is to deny to the defendant Gibson a fair trial in violation of the Fifth Amendment of the Constitution of the United States.

The Court. The court has made its ruling and will consider all objections which were voiced at side bar as being restated at this time and overruled by the court's overruling the objection to the question without the necessity of counsel restating anything which has been said before.

Mr. Strong. Your Honor, could that ruling and the objections go to this entire series of questions from that same report that we discussed at side bar and material that we discussed, and then we won't have to keep popping up on it?

The Court. Well, it will go to the next few questions. I don't know how long Mr. Goldstein is going to work from this transcript.

Mr. Strong. I mean just so your ruling on the objections and so that the objections will apply to the material discussed.

The Court. It will apply to this specific episode.

Mr. Strong. Yes.

The Court. And let us know when you think you are shifting from the episode, Mr. Goldstein.

Mr. Goldstein. Yes, your Honor.

May the reporter repeat the question? I have a copy of the transcript and I can repeat it, unless it will complicate matters.

The Court. Yes.

Mr. Ming. I am sorry. We can't hear you, Mr. Goldstein.

The Court. He says he will repeat it unless it will complicate matters. But we have had the ruling. I think the particular reporter who was taking the testimony this morning is not here at the moment, so

that if you will repeat it, Mr. Goldstein, I suggest you do so from transcript. I have been provided with the last or with the pending question. I take it you have. If you haven't, you may use mine.

Mr. Goldstein. Yes, I have, your Honor.

Mr. Williams. Would your Honor care to have it?

The Court. No. I have it.

Cross Examination (Continued)

By Mr. Goldstein:

Q. Mr. Gibson, was it the policy of the International Boxing Club, during the time you were an officer, to use the underworld to the extent that you could in the operation of your business?

A. That question I answered before the Kefauver Subcommittee. The question was based on a colloquy and a delimitation of the term "underworld" by Mr. Kittrie, a Committee counsel, who said that the term was not being used in its judicial sense but in the legislative sense of looking toward the future; and I answered it in the light of a pending piece of legislation that would be introduced by Senator Wylie that had a definition of a certain category of offenses for which persons who had been convicted of those offenses would be deemed guilty of a federal offense if they engaged in the field of boxing. I answered in terms of those—the definition of "underworld" in light of the Wylie bill and the Kittrie remark, yes.

The Court. Well, Mr. Gibson, the question was not what you had testified to before the Committee, but to the fact, the fact if it was a fact, or whatever

the fact was, you either did or did not, was it the policy of the International Boxing Club, during the period you were an officer, to use the underworld to the extent that you could in the operation of your business, and the answer you gave was a commentary upon how the word "underworld" was used in the testimony you gave before the Kefauver Committee. Now, would you answer the question that Mr. Goldstein put, and then we might get to the Kefauver testimony and we might not.

The Witness. I can't answer it, your Honor, without knowing what Mr. Goldstein means by the term "underworld."

Mr. Goldstein. I attach to it its common definition, Mr. Gibson, and ask you to apply whatever understanding you might have of that word.

Mr. Ming. Just a moment. Your Honor, I suggest there is no such thing as a common definition of any word, and therefore, the question is objectionable, as being, as I pointed out before, so vague and ambiguous so as not to be a proper question.

The Court. Well, there is a dictionary of contemporary American usage. I have just sent the bailiff to get it. We will see if the word is set forth there and if so, while I don't mean that you must use the word with tying to it that particular definition, it might give you a base from which to operate and accept Professor Bergen Evans' definition, or state what you mean by "underworld."

Mr. Ming. You mean for Mr. Goldstein to state what he means by "underworld"?

The Court. Yes.

Mr. Ming. In his question.

The Court. Yes, in his question, so Mr. Gibson will know what his answer will be.

Mr. Goldstein. Well, I certainly don't intend to tell Mr. Gibson what the word "underworld" means. It is what Mr. Gibson thinks the word "underworld" means that is relevant. It is not what I think about it. I have some very clear views on what "underworld" means, but I think it might be error for me to state those views in the presence of the jury.

Mr. Ming. In that event, your Honor, I will renew my objection.

Mr. Strong. The same objection.

The Court. Well, we are in the position where the witness claims inability to understand what you are driving at.

Mr. Goldstein. All right. Then I will ask——

The Court. Isn't that the situation, Mr. Gibson?

The Witness. Yes, sir.

The Court. You want to know what he means by underworld, so tell us what you mean when you use that word.

Q. By Mr. Goldstein. Mr. Gibson, do you recall testifying before the United States Senate on December 5, 1960 and being asked the following questions and giving the following answers——

Mr. Ming. Now, just a moment, Mr. Goldstein.

The Court. We can't come to an impeaching procedure unless the witness has first come into the giving of testimony which you seek to impeach.

Mr. Goldstein. My point is, your Honor, that apparently on December 5, 1960 he knew what the word "underworld" meant and I will simply ask him to attach and attribute that definition as of December 5, 1960 in answering the question.

The Court. All right.

Mr. Ming. Your Honor——

The Court. Mr. Gibson has told us what—I think he has, haven't you, sir?

The Witness. Yes, sir.

The Court. —what he understood the word "underworld" meant as used before the Senate Committee and if that is so, that definition is taken as a definition by which Mr. Goldstein wants the question answered.

Mr. Ming. Well, now, your Honor, so that the record will be perfectly clear and so I—I am sorry, your Honor—so that the record will be perfectly clear and I at least will know what is going on, is that the definition which Mr. Goldstein intends in his question?

The Court. I don't know.

Mr. Ming. Neither do I, your Honor, and until we find out, I suggest that the question is not proper; that the procedure is not consistent with orderly procedure.

The Court. I should think, from what Mr. Goldstein has said, that he wants the question answered with respect to that understanding of the term "underworld."

Mr. Goldstein. He, in his previous answer, did not define the term "underworld," your Honor.

The Court. The dictionary doesn't help us too much either. The dictionary says it is a place of departed spirits.

Mr. Strong. If that is the definition applied by the dictionary, I withdraw my objection.

The Court. Well, there is a second definition: The side of the globe opposite to one.

Then, a definition No. 4: The lower debased or criminal portion of humanity.

Those are dictionary definitions.

I am sorry to recess briefly. I don't think you need to leave the room. As you know, courts have many cases. I have 162, besides this one, that is, 162 civil cases, besides a number of criminal cases, and in connection with one of those cases I have what appears to be an urgent telephone call, so I will have to go and take that. Be at ease, but remain in the courtroom.

(Whereupon, a recess was taken from 2:03 o'clock p.m. to 2:06 o'clock p.m., and thereupon, the following proceedings were had in open court in the presence and hearing of the jury:)

Mr. Goldstein. May I proceed, your Honor?

The Court. You may proceed.

Q. By Mr. Goldstein. Mr. Gibson, was it the policy of the International Boxing Club, during the time you were an officer, to use the underworld to the extent that you could in the operation of your business?

Mr. Ming. Just a moment. Your Honor, that's the question to which the objection was made. I will repeat the objection, that the term "underworld" is

so vague and indefinite as to constitute the question an ambiguous and improper question, and therefore, the objection ought to be sustained, unless there is a definition by the person asking the question as to what he means by the term.

Mr. Goldstein. I will respectfully submit that is nonsense, your Honor.

Mr. Ming. Well, now, your Honor——

The Court. I don't think it's an unreasonable position, counsel. There have been different meanings to the term given at different times. Mr. Gibson has given one which he understood was being used by the Committee. Whether it was or not would remain for other evidence to establish, but because the Committee knows its purpose, if I suppose recorded the term somewhere, but certainly the witness would be entitled to know just what class you are inquiring about, because we don't ordinarily classify by any moral or legal standard the people with whom we are doing business; I don't say, "Well, we have a shyster coming in today," nor do I say, "We've got a real legal genius coming in today"; I recognize we have a lawyer. Now, you are asking him now to relate in a proceeding today whether it was his practice or the practice of his organization to deal with an uncertain class which you designate as underworld and I think you should tell him what that class includes within the meaning of your question.

Q. By Mr. Goldstein. Mr. Gibson, did you know what the word "underworld" meant when Mr. Bonomi asked you the questions before the Senate Committee in 1960?

Mr. Ming. Now, just a moment. I will object to that upon the ground that it is irrelevant, your Honor, and beyond the scope of the direct, as to what he knew a word to mean at a day not relevant to these proceedings and certainly not——

The Court. Overruled; overruled. We have got to have a few searching questions here in order to get a predicate for the testimony that Mr. Goldstein is going after primarily.

Mr. Ming. May I respectfully suggest, your Honor, all we need is a definition of the term from the questioner.

The Court. It's a term that is susceptible to many modifications and the like. The witness has said that before the Senate Committee he understood it to mean a certain thing. Now, counsel is entitled to probe a little with this witness in setting up the standard that is to be used for the inquiry. Your objection is overruled.

Mr. Ming. Well, then, your Honor, I have a motion to strike the question with which we began the proceeding, since it is not to be defined.

The Court. Well, we have moved away from that question without its being answered. We have moved into seeking definitions.

Mr. Ming. Then I must respectfully suggest that that is improper, your Honor, seeking definitions about matters which are not relevant to these proceedings.

The Court. No, Mr. Ming. We are going to be practical here in trying the lawsuit; nobody is going

to be put in a straitjacket, semantically, a semantic straitjacket or otherwise. But the objection to that question is overruled. Read the question, Mr. Reporter.

(Pending question read by the reporter as follows:

“Mr. Gibson, did you know what the word ‘underworld’ meant when Mr. Bonomi asked you the questions before the Senate Committee in 1960?”)

A. No, I didn’t know what the word meant, but I knew the context in which it was used before that Committee or in which Mr. Bonomi used it. I didn’t use it.

Q. By Mr. Goldstein. Were you asked this question before the Senate Committee on December 5, 1960, and did you give this answer—

Mr. Ming. Excuse me, Mr. Goldstein.

I will object to any reading of that transcript on the ground it is not shown to be relevant to any issue in this proceeding. It is not proper procedure. There is nothing here which goes to impeachment, because there is nothing to impeach.

Mr. Strong. Same objection. On the further ground that it is hearsay as to my client, not within the issue of this case.

The Court. Sustained.

You have to get—before you impeach something you have to get something to impeach.

Mr. Goldstein. I submit there is something to impeach.

The Court. There might be, but I am not too sure. I am not too sure. I would like to know what this

witness' understanding of the word "underworld" means, if he can give us a definition.

Maybe, Mr. Gibson, it would help you if I gave you this definition from Webster's New Collegiate Dictionary.

"Underworld" means "The lower, debased, or criminal, portion of humanity."

Mr. Strong. What does that mean, your Honor, "the lower portion of humanity"?

The Court. I am not going to argue with you. Please let Mr. Gibson answer my question. I want him to tell us what he understands "underworld" to mean. I read him a dictionary definition of it for his aid. Not necessarily to impose it upon him.

Mr. Ming. Your Honor, I most respectfully object to this procedure. It is not what Mr. Gibson means by a word, it is what the questioner who asked the question meant by the word. We have had no definition from Mr. Goldstein. In fact, we have had an absolute refusal on his part to define it or to accept your Honor's several dictionary definitions.

The Court. I think, considering the entire record, considering the answers this witness has given at other places, that it is not unreasonable to ask him to define the word.

Mr. Ming. What somebody else used?

The Court. Well, sir, I don't want to argue with you further. If I am in error, the upper court can correct me.

The judge who proceeded me on this bench, at about this point in the case, where I was trying, said, "Sit down and shut your mouth."

Mr. Ming. Well, your Honor——

The Court. The lawyer——

Mr. Ming. —I must respectfully suggest——

The Court. Well now, just a minute. Let me finish my story. It might not be very good, but I seldom get the floor.

The lawyer said, “Let the record show I am sitting down but I can’t represent my client with my mouth shut.”

I think I have heard you out on this. We had a long conference at the side bar. We are going to proceed in this fashion, and if it is prejudicial the gentlemen upstairs can take action on it.

Mr. Ming. May I respectfully suggest, your Honor,—I do this only personally—No. 1, that it is an unfortunate story. I think it is funny but unfortunate.

Secondly,——

The Court. You can’t represent your client with your mouth shut.

Mr. Ming. That is correct, your Honor, I cannot.

The Court. I did not mean to imply that you are gagged, but I think the colloquy on this problem has reached the stage that the usefulness of it has been exhausted.

Mr. Ming. Well, I am sorry, your Honor, I must respectfully disagree with you and I must object to the procedure because I regard it as improper and I would not be doing my duty either to my client or to the court if I did not point that out.

The Court. Well, I certainly am aware, being not entirely an unperceptive person, that this procedure

is considered objectionable to you. But I am going forward with it.

Can you tell us, sir, Mr. Gibson, what you understand "underworld" means? You may use or depart from the dictionary definition as you see fit.

The Witness. I can tell you what I meant before the Kefauver Committee where the word was used, and Mr. Goldstein asked me about Mr. Bonomi's use of the expression before that Committee.

The Court. We haven't gotten to the Kefauver Committee yet. I don't mean to depreciate you. But you are not exactly a young man. You have been around. What does the word "underworld" mean to you, sir?

It means something to you. I think it must mean something to every one of the jurors. What does it mean to you?

The Witness. The last question had to do with Mr. Bonomi's use of the word before the Committee.

The Court. Now, this last question did not.

Read the last question.

(Whereupon, the following question was read:

"What does the word 'underworld' mean to you, sir?")

The Court. That means right now, here you are in Court Room No. 6, 312 North Spring Street in Los Angeles. You are sitting here and we want to know what you understand the word "underworld" means, because it is going to be used in some questions put to you and you just tell us so that we will have you and Mr. Goldstein in the same terms of reference.

The Witness. I consider it to mean people who have been convicted of crimes of certain degrees and certain natures.

Q. By Mr. Goldstein. Mr. Gibson, was it the policy of the International Boxing Club, during the time you were an officer, to use the underworld to the extent you could in the operation of your business?

Mr. Strong. Same objection as heretofore made at the bench.

The Court. Overruled.

The Witness. Yes.

The Court. You are still under the umbrella, Mr. Strong.

Mr. Strong. Thank you, your Honor.

The Witness. Yes.

Mr. Goldstein. No further questions.

Mr. Ming. I was going to ask your Honor if we might have a conference at the side bar with regard to the succession of witnesses, this being Friday afternoon.

DEFENDANT GIBSON'S SPECIAL INSTRUCTION F

There is uncontradicted evidence that the defendant Gibson has a good reputation for honesty and integrity in the community where he resides. The circumstances may be such that an established reputation for good character alone may create a reasonable doubt as to the guilt of the defendant Gibson. You should take that evidence of good reputation into consideration along with all the other evidence as to him in determining the guilt or innocence of Mr. Gibson.

VOLUME 50, PAGES 7697-7699

In this case we have the conflict of problems that arises from that in the case of Defendant Gibson. As I recall it, the defendant Gibson was the only one who put his reputation in evidence. He called witnesses and they were asked questions, "Is his reputation good or bad?" And they said it was good.

That is offered as to someone under the same principle I mentioned regarding the Governor of New York. Mr. Gibson, of course, doesn't claim to be a governor of any political subdivision. He claims to be an active managing head of substantial commercial interests. He claims to be a member of the bar, and he claims to have a good reputation. This is not to say that people of good reputation are entitled to go and commit crimes. No one is entitled to commit crimes. But there might be instances, as in that possibly now getting about to the limit of its usefulness in instructions, that case we mentioned as to the Governor of New York being charged with robbery.

The jury is entitled to consider whether a person having such a reputation would commit such an offense. It is all up to you and you are to integrate all of this evidence. You are to integrate all of these instructions. Take nothing as an isolated matter. Consider the picture as a whole.

* * *

But so far as the reputation of any defendant is concerned, the only evidence here on what the reputation actually was of any defendant is that Gibson has offered evidence that his reputation was good.

Insofar as I can recall, strictly in the field of reputation evidence, that is, someone getting on the stand and saying, "I know what his reputation is," there was no evidence to the contrary.

But bear in mind that reputation evidence does have a very limited purpose in the trial.

* * *

No. 17,762.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

PAUL JOHN CARBO, et al.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT FRANK PALERMO.

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No. 17,762.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT.

PAUL JOHN CARBO, ET AL.

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT FRANK PALERMO.

JURISDICTION.

The appellant, Frank Palermo, was indicted with others in the United States District Court for the Southern District of California (Central Division), upon charges based upon 18 U. S. C., Section 371, 875(b) and 1951. Following trial by jury, appellant was convicted and sentenced. The judgment and commitment were entered on December 2, 1961 (TR 1496).¹ Notice of appeal was filed on December 2, 1961 (TR 1520). Jurisdiction existed in the district court pursuant to 18 U. S. C. Section 3231 and Rule 18, Fed. Rules Crim. Pro. Jurisdiction of this Court to review the final judgment of the district court is based upon 28 U. S. C. Sections 1291 and 1294(1).²

1. References designated "TR" are to the Clerk's Transcript of Record on Appeal filed and docketed on February 13, 1962 in this Court. References designated "R." are to the record of the trial.

2. Pertinent statutes are set out in Appendix A, *infra*.

STATEMENT OF THE CASE.

The indictment contains 10 counts, seven of which charge this appellant:

Count One charges a conspiracy with defendants Carbo, Sica, Dragna, Gibson and unindicted Daly to obstruct interstate commerce by means of extortion in violation of 18 U. S. C. Section 1951. Paragraph 3 thereof alleges that the objects of the conspiracy were that Palermo and Carbo, by use of threats of physical harm and violence and threats of economic loss and injury to the victims Donald Paul Nesseth and Leonard Blakely (hereinafter referred to as Leonard), were to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, Don Jordan, and to obtain control of the professional activities of Don Jordan by naming his opponents and the places where and conditions under which he would engage in such matches; that defendants would enlist the services of persons known to the said victims to have "underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence", and did enlist the defendants Sica and Dragna for this purpose, that is, to personally contact Leonard and Nesseth to obtain their agreement to the conspirators' demands; and that the defendant Gibson would use his power as an officer of a major promoter of nationally televised fights "and an influential figure in other business associations" to persuade victims Leonard and Nesseth to accede to the demands of the conspirators for the control of Jordan.

Count Two charges that in violation of 18 U. S. C. Section 1951, appellant Palermo and defendant Sica obstructed interstate commerce, and attempted to do so, by extortion of \$1,725.00 from Leonard by threatening him with physical injury.

Count Four charges that in violation of 18 U. S. C. Section 1951, appellant Palermo and defendant Sica obstructed interstate commerce and attempted to do so, by extortion, by attempting to coerce Nesseth into giving up a part of his contractual right to control Jordan by signing a match between Jordan and one Hart contrary to the wishes of Nesseth, through the wrongful use of force and fear.

Count Five charges the same persons named in Count I with conspiracy, pursuant to 18 U. S. C. Section 371, to commit an offense under 18 U. S. C. Section 875(b), i.e., to transmit in interstate commerce communications containing threats to injure Leonard and Nesseth with intent to extort moneys and a thing of value, i.e., a share of the management of Don Jordan.

Count Six charges that the appellant Palermo on January 27, 1959, with intent to extort a share of the management of Don Jordan, transmitted in interstate commerce a threat to injure Leonard in violation of 18 U. S. C. Section 875(b).

Count Eight charges that on April 28, 1959, appellant Palermo, with intent to export a share of the management of Don Jordan, transmitted in interstate commerce a threat to injure Leonard and Nesseth in violation of 18 U. S. C. Section 875(b).

Count Ten charges that on April 29, 1959, appellant Palermo, with intent to extort a share of the management of Don Jordan, transmitted in interstate commerce a threat to injure Leonard and Nesseth in violation of 18 U. S. C. Section 875(b).

This case concerns two independent transactions, one between the appellant Palermo and Jackie Leonard (whose real name is Blakely) with respect to services performed on behalf of the prize fighter Jordan by Palermo, and the other between Leonard and the appellant Gibson with respect to the Hollywood Legion Stadium. The Government attempted to tie these two together to show a conspiracy to

extort by threats from one Nesseth and Leonard moneys and a share in the fighter Jordan and to dictate Jordan's future boxing events.

The substance of the case is the testimony of Leonard, who is the only person allegedly threatened or from whom anything was allegedly demanded. It is from his mouth alone that all assertions of threats and fear of physical injury are derived.

It is in this context that, by way of rebuttal, the Government introduced into evidence Exhibit 177 over the objection of appellant. This Exhibit is a recording of a telephone conversation between Leonard and Palermo on May 5, 1959 made by an officer of the Los Angeles police department by attaching, with Leonard's consent, an induction coil to his home telephone. This Exhibit was requested by the jury to be played during the course of their deliberations.

In his charge to the jury, the trial judge did not instruct that should the jury have a reasonable doubt as to an essential element of an offense or of the guilt of a defendant, he must be acquitted. The jury was thus left without a specific direction as to its right and duty to return a verdict of not guilty, although in one instance the court did tell the jury that the Government was entitled to a verdict.

Again, the trial judge omitted to instruct the jury, despite several written requests on this score, that the conspiracy must be proved by independent evidence and that the acts and declarations of a defendant's alleged co-conspirators in his absence could not be used to establish the existence of the conspiracy. When this omission was called to the trial judge's attention, upon the conclusion of the charge, it was corrected only as to Gibson, but not this appellant, and an exception was granted to appellant.

The verdict was returned on May 30, 1961. Post-trial motions were filed, but before they could be briefed or argued, the trial judge, on June 11, 1961, died. Thereafter

further motions were filed requesting a new trial on that ground. However, Judge Boldt was assigned to the case, and he determined, in a written memorandum filed on October 13, 1961 (TR 1342), that he was satisfied that a successor judge could determine matters remaining to be determined in the case and denied the motion for new trial based on that ground. Thereafter, Judge Boldt heard the post-trial motions and decided them against the appellants on November 28, 1961 (TR 1446). On December 2, 1961, the appellants were sentenced. This appellant's sentence was fifteen years on Count 1 and a fine of \$10,000; five years each, consecutively, on Counts 2, 4 and 5; five years each, consecutively, on Counts 6, 8 and 10; but that the sentence of imprisonment imposed on Counts 2, 4, 5, 6, 8 and 10 should run concurrently with the sentence of imprisonment imposed on Count 1 (TR 1496).

SPECIFICATION OF ERRORS.

1. The court below erred in admitting into evidence and permitting to be played to the jury a recording illegally obtained of a telephone conversation between Palermo and Leonard.

Government Exhibit 177 is a recording made by an officer of the Los Angeles police department on May 5, 1959, at the home of Leonard of a telephone conversation between Leonard and Palermo. It was obtained through an induction coil device attached to Leonard's telephone with his consent but without the knowledge of Palermo. The exhibit was marked for identification at R. 6711 and received in evidence at R. 6726. (See Abstract, pp. 1297-1299.) Objection was made as follows (R. 6712-6715):

“Mr. Strong: To which I now object, your Honor, to the introduction or receipt in evidence of this recording on the basis of the Fourth and Fifth Amendments, in the Nardone case.

* * *

“Mr. Ming: Thank you. I would also like to object, your Honor, to the admission on the ground of violation of the limitations of both the Fourth and Fifth Amendments of the Constitution of the United States and more particularly as to the provisions of Section 605 of 47 United States Code, which specifically provides that no person not being authorized by the sender shall intercept any communication and divulge the existence, contents, etc. to any person, and I would ask the court to examine that statute which has been continuously applied by the Supreme Court and the Federal Courts.

* * *

“Mr. Parsons: The defendant Sica objects, your your Honor, on the grounds it is incompetent, irrelevant and immaterial, it amounts to violation of the Fourth and Fifth Amendments of the Constitution of the United States, and it amounts to a denial of due process of law, and as far as we know now it is here-say as to him, it is a direct violation of 47 U. S. C. Section 605.

* * *

“Mr. Beirne: May I interpose an objection on behalf of the defendant Carbo on the same grounds as stated by Mr. Ming and Mr. Parsons and Mr. Strong also.

“Mr. Bradley: And I join in the objection of all counsel.

* * *

“Mr. Strong: I am very gracious, then. I join in all the objections, in case they objected on broader grounds than I did.”

2. The Court erred in its instructions as to the jury in failing to instruct in the total charge (R. 7634-7735) as to when the appellant must be acquitted.³

At no time in its charge did the Court instruct the jury that if the Government failed to establish beyond a reasonable doubt all the essential elements of the offenses charged, then the defendant must be found not guilty. This omission is fundamental error and appellant is entitled to a new trial even though no specific exception was taken. Nevertheless, the Court did instruct the jury that (R. 7642):

“and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict.”

This aggravates the omission and further constitutes fundamental error as removing from the jury its ultimate right to determine guilt.

3. The Court erred in refusing to instruct the jury that membership in a conspiracy cannot be proved by the declarations of co-conspirators, but must be proved by independent evidence.

Upon the conclusion of the charge, at the time of discussion and exception, on behalf of appellant Palermo it was pointed out that the Court had omitted requested instructions and exception was noted (R. 7713). Thereupon, however, the Court instructed the jury:

“Now, in this regard you will recall that there is a principle that if a conspiracy actually exists, after it has come into being, that anything said by any one of the co-conspirators, if said for the purpose of furthering the conspiracy, is evidence against all.

That, of course, I reaffirm, but I do not mean to re-emphasize it, but when I gave it to you before this

3. Since this specification involves an omission from the *entire* charge, the entire charge is not therefore reprinted.

morning I omitted by inadvertence the other statement given today, and to put it in context I repeat it.

‘You are instructed that in considering the guilt or innocence of the defendant Gibson you may not consider the words or conduct of any other defendant not in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy.’

You probably realize, and you are now told Mr. Gibson is a defendant only in the conspiracy counts.” (R. 7714-7715)

Thereupon, exception was taken as follows (R. 7719):

“Mr. Strong: In giving the instruction with relation to Mr. Gibson and using his name, actually they apply to the defendant Palermo.

“Mr. Beirne: All of the defendants. The declarations [and] acts of a co-conspirator can’t be used to establish a conspiracy. It must be proved by independent evidence. Membership in a conspiracy cannot be proved by declaration, that must be proved by independent evidence.

* * *

“The Court: . . . your exception is noted.”

4. The appellant Palermo is entitled to a new trial by reason of the death of the trial judge prior to the determination by him of the post-trial motions.

On October 13, 1961, Judge Boldt, assigned as successor judge, entered a memorandum denying a new trial

by reason of the death of the trial judge and granting to each defendant an exception (TR 1342-1344). The pertinent part of the memorandum is as follows:

“* * * At the time of Judge Tolin’s death on June 11, 1961, sentence had not been imposed on any defendant, and ruling had not been made on the Dragna motion for acquittal, a written acquittal motion of defendant Gibson or on any of the new trial motions.

On June 26, 1961, by order of Chief Judge Hall pursuant to Fed. Crim. Rule 25, this cause was assigned to the undersigned as successor judge for the conduct of all further proceedings herein. All defendants filed supplemental motions for new trial on the asserted ground that judicial duties in the case cannot be performed properly by a successor judge. * * *

The supplemental motions are principally based on the contention that because a successor judge was not present at the trial he cannot acquire “the feel of the case” sufficiently to understand and exercise sound discretion in various matters including appraisal of the credibility of the evidence supporting the verdict. In order to fully and fairly consider this contention an extensive and detailed study has been made of all testimony and proceedings in the case. A complete and detailed abstract thereof has been prepared which, when typed in final form, will be filed as an appendix to this order.

The record clearly shows that the able and experienced trial judge conducted the entire proceedings with remarkable patience and restraint, giving fair and thoughtful attention to the frequent and numerous objections and contentions presented by veteran and vigorous counsel. From a review of the entire record it appears to my complete satisfaction that all judicial duties and functions subsequent to verdict, including

evaluation of the evidence for all necessary purposes, can and should be performed by a successor judge. To do so will require much time, effort and concern. Such considerations, however, will not justify evasion of judicial duty by the simple and easy solution of granting a new trial. After extensive consideration of the matter I have reached the firm conclusion and conviction that a successor judge, within the limits of his character, ability and experience, can decide all undetermined issues in the case without impairment in any respect or degree of the lawful rights of any defendant. Accordingly, without prejudice to or ruling on any other contention asserted in any other pending motion, it is hereby

ORDERED that each and all of defendants' supplemental motions for new trial be and the same hereby are denied. Exception allowed to each defendant."

It is the contention of the appellant that in the circumstances of this case a successor judge could not determine the post-trial motions and do substantial justice in the matter.

5. The appellant Palermo incorporates herein by reference the specifications of error stated by each of the other appellants in this cause.

ARGUMENT.

1. The Appellant Is Entitled to a New Trial by Reason of the Use of Illegally Obtained Evidence.

(Specification of Error No. 1.)

The Government succeeded in having admitted into evidence over appropriate objection, Exhibit 177, which is a recording made by an officer of the Los Angeles police department on May 5, 1959, of a telephone conversation between Leonard and appellant Palermo. This recording was obtained by attaching an induction coil to Leonard's telephone with his consent to pick up the conversation and transmit it to a recording device (R. 6708-6726).

Section 605 of the Federal Communications Act of 1934, 47 U. S. C. Section 605 provides in pertinent part:

“* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted message communication to any person * * *”

This statute establishes the public policy against the “dirty business” of the eavesdropper's intrusion recognized and eloquently decried against by the dissenting justices in *Olmstead v. United States*, 277 U. S. 438 (1928). Despite the statute, such eavesdropping continued by law enforcement officers, state and federal, as well as private persons. All are lawbreakers under the Act. In *Nardone v. United States*, 302 U. S. 379 (1937), the Supreme Court dealt a lethal blow to arguments seeking to limit or rationalize the legislative proscription so as to permit the eavesdropping and use of the evidence obtained thereby. That “no person” does not mean “no person except [a law enforcement officer]” and “divulge” does not mean “divulge except [in court]” is the plain decision of the Court:

“ . . . the plain words of Section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that ‘no person’ shall divulge or publish the message or its substance to ‘any person’. To recite the contents of the message in testimony before a court is to divulge the message . . .

It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved Congress to adopt Section 605 as evoked the guarantee against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution” (302 U. S. at pages 382-383). (Emphasis in text.)

The rather patent flouting of the clear meaning of this decision by the Government, in using testimony which was indirectly the result of illegal interception, was denounced in the second *Nardone* decision, 308 U. S. 338 (1939). This decision unequivocally applied the policy excluding from evidence “the fruit of the poisonous tree”—the products and by-products of illegal interception.

Further, the Supreme Court has determined that Section 605 applies to intrastate as well as interstate communications. *Weiss v. United States*, 308 U. S. 321 (1939). And from *Schwartz v. United States*, 344 U. S. 199 (1952), it is clear that violation of the federal statute by a state officer, even though his conduct was pursuant to state law,

is subject to federal prosecution. In *Benanti v. United States*, 355 U. S. 96 (1957), it was held that evidence obtained through wiretapping by state officers was inadmissible in a federal court. So also, it has been held that a federal employee, prosecuted for disloyal conduct, may successfully object to the use of evidence obtained by monitoring calls including those passing over the telephone assigned to such employee at work. *United States v. Coplon*, 185 F. 2d 629, 636 (2d Cir. 1950), cert. denied, 342 U. S. 920.

Unquestionably the courts are committed to the proposition that the Act is a compelling and inflexible bar to the use and reception of evidence obtained by intercepting telephone messages. For this reason, it was reversible error to receive into evidence Exhibit 177. The significance of this item of evidence is emphasized by the fact that the jury had the recording played while it was in the course of its deliberations (R. 7760).

It is further submitted that the circumstances under which the recording was obtained constitute a violation of appellant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution. Cf. *Elkins v. United States*, 364 U. S. 206 (1960); *Mapp v. Ohio*, 367 U. S. 643 (1961).

2. The Court Omitted to Instruct the Jury in Plain Words When It Must Acquit, and This Constitutes Fundamental Prejudicial Error.

(Specification of Error No. 2.)

The charge of the trial court was designed to tell the jury when it should convict. Indeed, one cannot but come to the conclusion that the charge evinces a conscious effort to avoid the words "not guilty" and "acquit". But the Court did clearly emphasize when the jury could convict. This one-sidedness is highlighted by the instruction (R. 7642):

“While remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government *is entitled to a verdict.*” (Emphasis supplied.)

It is submitted that the quoted instruction essentially constitutes an instruction to convict. That such an instruction is fundamentally erroneous and per se reversible error as removing from the jury its ultimate right to determine guilt is well-settled.

As stated in *United States v. Gollin*, 166 F. 2d 123 (3d Cir. 1948), cert. denied, 333 U. S. 875, at page 127:

“The District Judge was without power to direct a verdict of guilty although no fact might have been in dispute. *Sparf & Hansen v. United States*, 156, 51, 105; *United States v. Taylor*, c.c. 11 F. 470; *Atchison T. & S. F. Ry. Co. v. United States*, 7 Cir. 172 F. 194. And what a judge is forbidden to do directly he may not do indirectly. *Peterson v. United States*, 8 Cir., 213 F. 920.”

As further pointed out in that decision, even an earlier instruction (which was not given in the case now on appeal) that if the jury did not find such facts it must acquit, does not cure such error.

It is an inherent feature of trial by jury, protected by the Federal Constitution, that it is the jury's exclusive function to determine the question of the defendant's guilt or innocence. *United States v. Link*, 202 F. 2d 592, 595 (3d Cir. 1953). In that case, the Court recognized the significance of the district court's error:

“Trial judges must always keep in mind the possible, if not probable, effect of any statement which they might make in the course of a trial, or in their instructions to the jury. As was said in *Starr v. United States*, 1894, 153 U. S. 614, 625:

‘It is obvious that under any system of jury trials the influence of the trial judge on the jury is neces-

sarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.’

In *Bollenbach v. United States*, 1946, 326 U. S. 607, the Supreme Court quoted with approval this statement in *Starr v. United States* and in so doing noted that * * * *jurors are ever watchful of the words that fall from him (the trial judge). Particularly in a criminal trial, the judge’s last word is apt to be the decisive word.*” (Emphasis in text.)

The statement of the court that “a defendant is entitled to any reasonable doubt” hardly qualifies as a clear instruction.⁴ It was required of the court to instruct the jury what in law is the absolute duty of the jury, where it has a reasonable doubt it must return a verdict of not guilty. In *McKenzie v. United States*, 126 F. 2d 533 (D. C. Cir. 1942), the court said at page 536:

“And the failure to say in plain words that if the circumstances of the identification were not convincing, they should acquit, was error. Passing upon a similar question in *McAfee v. United States*, 70 App. D. C. 142, 105 F. 2d 21, we said on this subject, it should be orthodox practice somewhere in the instruction to tell the jury in precise terms that a “not guilty” verdict is necessary in the event of failure by the government to prove each of the elements of the offense beyond a reasonable doubt.

In that case, as in this, the court told the jury in the usual terms that the defendant was presumed innocent and that the government was obliged to rebut this presumption by proof of guilt beyond a reasonable doubt. But in that case, as in this, the court failed to

4. Various of the requested instructions for charge filed did ask that if the jury did not find the elements to which the specific requests were directed, then the jury must acquit the defendants. Palermo’s request “C” (TR 687), and others included by reference (TR 683): requests nos. 6 (TR 649), 20 (TR 664), 22 (TR 665), 24 (TR 667), 25 (TR 668), 27 (TR 670), 32 (TR 675).

say in terms, that unless they found from the evidence beyond a reasonable doubt that all of the elements of the crime charged existed, they must acquit the defendant. That is the rule in the District of Columbia and it should have been followed in the present case, and since it was not, we are required to reverse and remand the case for a new trial.”

The failure to charge a jury as to the right and duty to return a verdict of not guilty deprived the accused of a substantial right and was prejudicial. *State v. Howell*, 10 S. E. 2d 815, 218 N. C. 280 (1940). If the books do not abound in cases on the point, it is because the proposition is so clear that trial courts do not omit the instruction. The importance of the instruction here is self-evident. As in the *McKenzie* case, the burden of the Government’s case rested primarily on the veracity of Leonard. Leonard had given statements conflicting with each other and with his testimony to the F. B. I. and to the State Athletic Investigation Committee. In addition, there was evidence in this case that his reputation for veracity was bad. In the circumstances, the total failure to instruct the jury in plain terms as to the consequences of a reasonable doubt is a fundamental inadequacy in the charge which entitles the defendant to a new trial. Rule 52, Fed. Rules Crim. Pro.; cf. *Morris v. United States*, 156 F. 2d 525 (9th Cir. 1946).

3. The Court Erred in Refusing to Instruct the Jury With Respect to the Relation of the Acts and Declarations of Co-Conspirators With Respect to Establishing the Existence of a Conspiracy.

(Specification of Error No. 3.)

The point of law appellant here raises is not one as to which either the Government or the court below was in disagreement. There is no doubt as to the law. *Glasser v. United States*, 315 U. S. 60, 75 (1942).

In fact, although the defendants requested instructions to cover the law,⁵ the Court in its original charge omitted to cover the matter. Thereafter, counsel for Palermo called to the attention of the Court that it had omitted requested instructions (R. 7713). The Court conceded that it had "overlooked a few" (R. 7714). It then proceeded to instruct as follows:

"You are instructed that in considering the guilt or innocence of the defendant Gibson you may not consider the words or conduct of any other defendant in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy." (R. 7714-7715)

Thereupon counsel for appellant asked that the instruction be extended to include appellant (R. 7719), and other counsel restated the correct application of the law requested (R. 7719). The Court denied the request on the mistaken thought that it had covered the point adequately (R. 7719). This left the jury with the final instruction on conspiracy given immediately preceding the Gibson instruction quoted above:

"The question of the guilt or innocence of any defendant must be determined from the evidence which relates to him and must not be controlled or affected by testimony which relates only to other defendants." (R. 7714)

Such instruction obviously does not cover the error here noted, but indeed makes the requested instruction imperative. The refusal to correct the omission as to Palermo

5. Carbo requests Nos. 1 (TR 644), 3 (TR 646), 4 (TR 647); Sica request No. 11 (TR 705); Dragna request Nos. 4 (TR 725), 5 (TR 726); Gibson request "D" (TR 734). These were incorporated by reference in Palermo's requests (TR 683).

when a correct instruction was given as to Gibson, aggravates the harm and draws a distinction unwarranted by the record between the defendants insofar as the conspiracy counts are concerned.

It is submitted that the refusal to correctly charge on the matter in accordance with the requests of the appellant, particularly when the matter was brought to the Court's attention, and then a correction is made limited to one defendant constitutes substantial and prejudicial error requiring a new trial.

4. The Death of the Trial Judge Before Disposition of the Post-Trial Motions Requires That a New Trial Be Granted.

(Specification of Error No. 4.)

The trial judge in this case unfortunately died prior to the disposition of the post-trial motions of the defendants; indeed, he did not receive the memoranda which were to be prepared or hear the arguments in support of the motions. On October 13, 1961, Judge Boldt denied motions for new trial on the ground that the matter could proceed in his hands as successor judge in the case (TR 1342).

Rule 25, F. R. Crim. Pro., provides as follows:

“If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.”

In *Connelly v. United States*, 249 F. 2d 576 (8th Cir. 1957), the Court said, at page 580:

“There might well be a criminal case in which the testimony would be of such character that a successor judge could not fairly pass upon the questions here presented. If the evidence of the government were denied and the question of credibility of the government witness was a serious issue the conflict in the evidence and the question of the credibility of witnesses might be a matter of very serious consideration. However, in the instant case the evidence of the government was not of that character.”

This appellant need not belabor what must appear to be obvious, that this is not a case in which hearing the witnesses and observing their demeanor are secondary. Even a cursory examination of the 7500-page record and the 300-odd exhibits will disclose the searching, detailed and extensive attacks upon witnesses of major and minor importance. The Government's case in chief pivots upon a single witness, Leonard, whose integrity and truthfulness are belied by the contradictory statements given by him at various times. The evidence traveled the gamut from hotly contested major issues to hotly contested collateral or minor issues. The transcribed record cannot re-create the trial, nor record the experiences, observations and necessarily unuttered thoughts of the trial judge: he was entitled to keep these to himself until the final expression of his views was called for, not by the verdict, but by the post-trial motions. To him was relegated the final authority to act, even *sua sponte*, to grant a new trial in the interest of justice. Rule 33, Fed. Rules Crim. Pro. The function of the trial judge is to bring to bear his observations and experiences during the trial in disposing of post-trial motions, to pass upon the weight of the evidence and the credibility of witnesses. In this respect, his function differs from that of the appellate court, which resolves only the question whether error was committed or discretion abused. Cf. *United States v. Beacon Musical Instrument Co.*, 135 F.

Supp. 220, 222-223 (D. Mass. 1955). Plainly, the "cold print" does not preserve the "lost evidence" witnessed by the trial judge: it "is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." *Broadcast Music v. Havana Madrid Restaurant Corp.*, 175 F. 2d 77, 80 (2d Cir. 1940). The power of a trial court with respect to a motion for a new trial is broad. *United States v. Robinson*, 71 F. Supp. 9, 10 (D. C. D. C. 1947); *United States v. Beacon Instrument Co.*, *supra*. Indeed, the trial judge has been said to act as a thirteenth juror. *United States v. Applebaum*, 274 Fed. 43, 46 (7th Cir. 1921).

It is respectfully submitted that the successor judge here could not have brought to the consideration of the post-trial motions the requisite fund of knowledge and observation *as to this case* invoked by the motions. To the contrary, he could only act after the manner of a reviewing or appellate tribunal, but this is a different function and not the one he must fulfill.

It is submitted that Rule 25 "shows a generous attitude toward a new trial where a trial judge dies before the case is disposed of." *Brennan v. Grisso*, 198 F. 2d 532 (D. C. Cir. 1952). As much as the court below felt constrained that a long trial should not be repeated because of the untimely death of the trial judge, so also that fact should not deter the grant of a new trial in the interest of substantial justice.

5. The Appellant Palermo Adopts the Arguments, to the Extent Relevant, of Each of the Other Appellants in This Cause Without Repeating Them in This Brief.

CONCLUSION.

For the reasons stated, and the reasons stated by the other appellants in this cause, this Court should grant the appellant a new trial or judgment of acquittal.

Respectfully submitted,

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Los Angeles 14, Cal.,
Attorneys for Appellant,
Frank Palermo.

APPENDIX A.

Relevant Statutes.

28 U. S. C.

Section 1291: Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, Sec. 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, Sec. 12(e), 72 Stat. 348.

Section 1294: Circuits in which decisions reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

* * *

18 U. S. C.

Section 371: Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

* * *

Section 875: Interstate Communications

* * *

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

Section 1951: Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or to the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Rule 18, Fed. Rules Crim. Pro.:

DISTRICT AND DIVISION.

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.

APPENDIX B.

 Table of Exhibits.

<i>Plaintiff's Exhibits</i>	<i>For Identification</i>	<i>In Evidence</i>	<i>Rejected</i>
1	417	417	
2	417	417	
3	417	417	
4	417	417	
5	417	417	
6	417	417	
7	417	417	
8	417	417	
9	417	417	
10	417	417	
11	417	417	
12	417	417	
13	417	417	
14	417	417	
15	417	417	
16	417	417	
17	417	417	
18	417	417	
19	417	417	
20	417	417	
21	417	417	
22	417	417	
23	417	417	
24	417	417	
25	417	417	
26			558
26-A	1619		
27			558
28	417	417	
29	417	417	
30	417	417	

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<i>Plaintiff's Exhibits</i>	<i>For Identification</i>	<i>In Evidence</i>	<i>Rejected</i>
31	417	417	
32	582	582	
33	582	582	
34	582	582	
35	582	582	
36	582	582	
37	582	582	
38	582	582	
39	582	582	
40	582	582	
41	582	582	
42	582	582	
43	582	582	
44	582	582	
45	582	582	

<i>Plaintiff's Exhibits</i>	<i>For Identification</i>	<i>In Evidence</i>
46	582	582
47	582	582
48	582	582
49	582	582
50	633	635
51	646	646
52	652	654
53	661	
54	661	
55	661	
56	666	667
57	669	669
58	725	726
59	747	748
60	762	
61	763	

<i>Plaintiff's Exhibits</i>	<i>For Identification</i>	<i>In Evidence</i>
62	763	
63	763	
64	763	
65	763	
66	786	788
67	786	790
68	786	790
69	1693	
70	1725	1726
71	1725	1726
73	1725	1726
74	1731	1735
75	1731	1735
76	1731	1735
77	1854	
78	1854	
79	1855	
80	2071	
81	2160	2161
82	2164	2165
83-A	2170	2171
83-B	2170	2171
84-A	2178	2179
84-B	2178	2179
85-A	2187	2189
85-B	2187	2189
85-C	2187	2189
86-A	2187	2190
86-B	2187	2190
86-C	2187	2190
86-D	2187	2190
86-E	2187	2190
87-A	2189	2190
87-B	2189	2190
88-A	2190	2191

<i>Plaintiff's Exhibits</i>	<i>For Identification</i>	<i>In Evidence</i>
88-B	2190	2191
89	2191	2193
90-A	2191	2193
90-B	2191	2193
91-A q	2191	2192
91-B	2191	2192
91-C	2191	2192
92-A	2192	2192
92-B	2192	2192
93	2211	
94	2224	
95	2325	
96	2337	2428
96-A	2508	
97	2337	2428
98	2339	
99	2339	
100	2343	2527
101	2344	2508
101-A	2508	
102	2358	
103	2438	
104-A	2544	2546
104-B	2544	2546
105-A	2544	2546
105-B	2544	2546
106-A	2544	2546
106-B	2544	2546
107-A	2554	2557
107-B	2554	2557
107-C	2554	2557
108-A	2565	2566
108-B	2565	2566
109-A	2565	2566
109-B	2565	2566

<i>Plaintiff's Exhibits</i>	<i>For Identification</i>	<i>In Evidence</i>
110-A	2569	2571
110-B	2569	2571
110-C	2569	2571
111	2603	2606
112	2603	2606
113	2603	2606
114	2619	2620
115	2619	2620
116	2636	2638
117	2636	2638
118	2636	2638
119	2724	2724
120	2725	2725
121	2725	2725
122	2915	2927
122-A	6427	6427
123	3014	
124	3015	3016
125	3232	
126	3264	
127	3668	3669
128	3788	
129 (portions)	6293 (also see Exhibit 152)	
130	3946	
131	3955	
132	4174	
133	4390	4393
134	5361	
135	5372	
136	5373	
137	5373	
138	5373	
139	5594	
140	5594	
141	5594	

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<i>Plaintiff's Exhibits</i>	<i>For Identification</i>	<i>In Evidence</i>
142	5594	
143	5717	5725
144	6006	6494
145	6185	6190
146	6187	
147	6187	6190
148	6187	6190
149	6286	6286
150	6286	6286
150-A	6286	6286
150-B	6286	6286
151	6289	
152 (Substituted copy of portions of Exhibit 29)	6289	6323
153	6292	
154	6304	
155	6304	
156	6306	6314
157	6308	6314
158	6308	6314
159	6308	6314
160	6328	6329
161	6429	6431
162	6430	6431
163	6430	6431
164	6515	
165	6552	6553
166	6555	6556
167	6558	6558
168	6570	6571
169	6570	6571
170	6623	6631
171	6623	6627
172	6624	6627
173	6624	6630

<i>Plaintiff's Exhibits</i>	<i>For Identification</i>	<i>In Evidence</i>
174	6635	6636
175	6695	
176	6702	6708
177	6711	6726

<i>Defendants' Exhibits</i>	<i>For Identification</i>	<i>In Evidence</i>	<i>Rejected</i>
A	1121		
B	1444		
C	1568	3059	
D	1643	3059	
E	1644	3059	
F	1975		4101
G	1975		4101
H	2025		
I	2025		
J	2074		
K	2074		
L	2074		
M	3026		
N	3027		
O	3427		
P	3481	3482	
Q	3493	3498	
R	3493	3498	
S	3493	3498	
T	3493	3498	
U	3493	3498	
V	3493	3498	
W	3493	3498	
X	3523		
Y	3528		
Z	3533	3534	

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<i>Defendants'</i> <i>Exhibits</i>	<i>For</i> <i>Identification</i>	<i>In Evidence</i>	<i>Rejected</i>
Z-1	3533	3534	
Z-2	3533	3534	
Z-3	3533	3534	
Z-4	3540	3541	
Z-5	3549	3550	
Z-6	3552	3552	
Z-7	3553	3553	
Z-8	3556	3556	
Z-9	3574	3574	
Z-10	3574	3574	
Z-11	3598		
Z-12	3609		
Z-13	3610	3611	
Z-14	3621	3622	
Z-15	3630	3635	
Z-16	3639	3635	
Z-17	3639		3639
Z-18	3639		3639
Z-19	3639		3639
Z-20	3645	3647	
Z-21	3656		3657
Z-22	3850		
Z-23	3895		3898
Z-24	3895	5108	3898
Z-25	3895	5108	3898
Z-26 Z-26	3900		
Z-27	3911		
Z-28	3911		
Z-29	4101		4101
Z-30	4101		4101
Z-31	4101		
Z-32	4101		
Z-33	4347		4349
Z-34	4347		4349
Z-35	4347		4350

<i>Defendants'</i> <i>Exhibits</i>	<i>For</i> <i>Identification</i>	<i>In Evidence</i>	<i>Rejected</i>
Z-36	4351		4353
Z-37	4351	5264	
Z-39	4437	4439	
Z-40	4437	4439	
Z-41	4437	4439	
Z-42	4437	4439	
Z-43	4437	4439	
Z-44	4437	4439	
Z-45	4437	4439	
Z-46	4437	4439	
Z-47	4437	4439	
Z-48	4437	4439	
Z-49	4437	4439	
Z-50	4440	4441	
Z-51	4440	4441	
Z-52	4440	4441	
Z-53	4440	4441	
Z-54	4440	4441	
Z-55	4440	4441	
Z-56	4440	4441	
Z-57	4440	4441	
Z-58	4440	4441	
Z-59	4440	4441	
Z-60	4440	4441	
Z-61	4440	4441	
Z-62	4440	4441	
Z-63	4440	4441	
Z-64	4440	4441	
Z-65	4440	4441	
Z-66	4440	4441	
Z-67	4440	4441	
Z-68	4598		
Z-69	4649	4650	
Z-70	4674		
Z-71	4675	4676	

<i>Defendants'</i> <i>Exhibits</i>	<i>For</i> <i>Identification</i>	<i>In Evidence</i>	<i>Rejected</i>
Z-72	5249	5254	
Z-73	5274	5277	
Z-74	5827	5277	
Z-75	5827		
Z-76	5827		
Z-77	5827		
Z-78	5827		
Z-79	5827		
Z-80	5827		
Z-81	5827	5828	
Z-82	5827	5828	
Z-83	5827	5828	
Z-84	5827	5828	
Z-85	5827	5828	
Z-86	5827	5828	
Z-87	5827	5828	
Z-88	5827	5828	
Z-89	5827	5828	
Z-90	5827	5828	
Z-91	5827	5828	
Z-92	5827	5828	
Z-93	5827	5828	
Z-94	5827	5828	
Z-95	5827	5828	
Z-96	5827	5828	
Z-97	5827	5828	
Z-98	5827	5828	
Z-99	5827	5828	
Z-100	5827	5828	
Z-101	5827	5828	
Z-102	5827	5828	
Z-103	5827	5828	
Z-104	5827	5828	
Z-105	5827	5828	
Z-106	5827	5828	

<i>Defendants' Exhibits</i>	<i>For Identification</i>	<i>In Evidence</i>	<i>Rejected</i>
Z-107	5827	5828	
Z-108	6250	6253	
Z-109	6250	6253	
Z-110	6250	6253	
Z-111	6656	6659	
Z-112	6659	6659	

<i>Court's Exhibits</i>	<i>For Identification</i>	<i>In Evidence</i>
1	43	
2	2520	
3	2647	
4	3040	
5	3936	
6	3936	
7	3936	
8	5430	
9	7628	
9-A	7628	
10	7628	

CERTIFICATE OF COMPLIANCE.

I, Jacob Kossman, counsel for appellant Frank Palermo herein, certify that I have examined the provisions of Rules 18 and 19 of the Rules of the Court and that in my opinion the tendered brief conforms to all requirements.

JACOB KOSSMAN.

No. 17762

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK PALERMO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from
The United States District Court
Southern District of California

SUPPLEMENTAL BRIEF ON BEHALF
OF APPELLANT FRANK PALERMO

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Los Angeles 14, California

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Attorneys for Appellant
FRANK PALERMO

FILED

FRANK

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Argument:	13
I The appellant was denied due process of law and the equal protection of the laws in being committed to jail at the opening of the trial of the action without notice or opportunity to be heard and with great prejudice to him in the preparation of his defense and in his appearance before the jury.	
Bail is a matter of right under the Eighth Amendment to the Constitution of the United States and under Rule 46(a), Rules of Criminal Procedure for the District Courts of the United States. Stack v. Boyle, 342 US 1, 96 L.ed. 3.	13
II Section 1951 of Title 18, inher- ently and as construed and applied in this case, violates the Fifth Amendment to the Constitution of the United States. Congress has not intended to include boxing and prize fighting within the meaning of section 1951, Title 18. Boxing is a local affair and Congress has not legislated in this section to cover boxing or prize fighting. The statute, inherently and as con- strued and applied in this case, insofar as boxing and prize fight- ing are concerned, is so vague, indefinite and uncertain as to	

constitute a violation of the
due process clause of the Fifth
Amendment to the Constitution of
the United States.

24

III Section 1951 of Title 18, inher-
ently and as construed and applied
in this case, violates the Tenth
Amendment to the Constitution of
the United States.

29

IV Section 875 of Title 18, inher-
ently and as construed and applied
in this case, violates the Fifth
and Tenth Amendments to the
Constitution of the United States.

32

V Section 371 of Title 18, inher-
ently and as construed and applied
in this case, violates the Fifth
and Tenth Amendments to the Consti-
tution of the United States and
duplicates the charge contained in
Title 18, section 1951, which is
exclusive.

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Conclusion

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK PALERMO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from
The United States District Court
Southern District of California

SUPPLEMENTAL BRIEF ON BEHALF
OF APPELLANT FRANK PALERMO

Appellant Frank Palermo asks leave of Court to supplement the previous brief filed with the following supplemental brief adding five points on appeal in his behalf.

This is a supplemental brief to the opening brief filed in this case on behalf of Frank Palermo. A statement of the facts other than those referred to in this argument is contained in the original brief.

Appellant was charged in an indictment with violations of sections 1951, 875(b) and 371 of Title 18, U.S. Codes. The trial started on February 21, 1961 and immediately upon the outset of the trial the appellant, who had been at liberty on an original bail of \$100,000, reduced to \$2500, and on \$2500 bail at all times thereafter until the first day of the trial, February 21, 1961, was thereupon summarily committed to jail and denied the right to have bail during the time of trial. Sentence was pronounced on December 2, 1961 and the trial court again fixed bail pending appeal for the appellant, who was released on December 4, 1961 in the bail of \$100,000 and has been at all times since then at liberty on bail.

Judgment of imprisonment of 15 years on Count 1 and a fine of \$10,000 and 5 years each, consecutively, on Counts 2, 4 and 5; 5 years each, consecutively, on Counts 6, 8 and 10 were pronounced with the sentences of imprisonment imposed on Counts 2, 4, 5, 6, 8 and 10 to run concurrently with the sentences imposed on Count 1 (R. 1496).

JURISDICTION

Notice of appeal was filed on December 2, 1961,

the same date as sentence was pronounced, together with an application for bail, which was granted (R. 1520). Jurisdiction is conferred upon this Court by reason of the provisions of Title 18, section 3291, Rule 19, Federal Rules of Criminal Procedure and Title 28, sections 1291 and 1294(1).

CONSTITUTIONAL PROVISIONS AND STATUTES
INVOLVED IN THIS SUPPLEMENTAL BRIEF

The Fifth Amendment to the Constitution of the United States provides as follows:

"No person shall be ... deprived of life, liberty or property without due process of law."

The Sixth Amendment to the Constitution of the United States provides as follows:

"Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Eighth Amendment to the Constitution of the United States provides as follows:

"Bail. Punishment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Tenth Amendment to the Constitution of the United States provides as follows:

"Rights reserved to the States or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Title 18, U.S. Codes, section 371, provides as follows:

"Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18, U.S. Codes, section 375(b), provides as follows:

"(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate

commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both."

Title 18, U.S. Codes, section 1951, provides as follows:

"Interference with commerce by threats or violence.

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section --

"(1) The term 'robbery' means

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia, and any point outside thereof; all

commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

"(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-183 of Title 45."

Title 18, U.S. Codes, section 3141, provides as follows:

"Bail may be taken by any court, judge, or magistrate authorized to arrest and commit offenders, but in capital cases bail may be taken only by a court of the United States having original or appellate jurisdiction in criminal cases or by a justice or judge thereof."

Title 18, U.S. Codes, section 3142, provides as follows:

"Any party charged with a criminal

offense and admitted to bail, may, in vacation, be arrested by his surety, and delivered to the marshal or his deputy, and brought before any judge or other officer having power to commit for such offense; and at the request of such surety, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such surety; and the person so committed shall be held in custody until discharged by due course of law."

Title 13, U.S. Codes, section 3143, provides as follows:

"Additional bail.

"When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person previously admitted to bail on any such charge is about to abscond, and that his

bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof."

Rule 46(a), Rules of Criminal Procedure for the District Courts of the United States provides as follows:

"Right to bail.

"(1) Before Conviction. A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

SPECIFICATION OF ERRORS
IN ADDITION TO OPENING BRIEF

I

The appellant was denied due process of law and the equal protection of the laws in being committed to jail at the opening of the trial of the action without notice or opportunity to be heard and with great prejudice to him in the preparation of his defense and in his appearance before the jury.

Bail is a matter of right under the Eighth Amendment to the Constitution of the United States and under Rule 46(a), Rules of Criminal Procedure for the District Courts of the United States. Stack v. Boyle, 342 US 1, 96 L.ed. 3.

II

Section 1951 of Title 18, inherently and as construed and applied in this case, violates the Fifth Amendment to the Constitution of the United States. Congress has not intended to include boxing and prize fighting within the meaning of section 1951, Title 18. Boxing is a local affair and Congress has not legislated in this section to cover boxing or prize fighting. The statute, inherently and as construed and applied in this

case, insofar as boxing and prize fighting are concerned, is so vague, indefinite and uncertain as to constitute a violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

III

Section 1951 of Title 18, inherently and as construed and applied in this case, violates the Tenth Amendment to the Constitution of the United States.

IV

Section 375 of Title 18, inherently and as construed and applied in this case, violates the Fifth and Tenth Amendments to the Constitution of the United States.

V

Section 371 of Title 18, inherently and as construed and applied in this case, violates the Fifth and Tenth Amendments to the Constitution of the United States and duplicates the charge contained in Title 18, section 1951, which is exclusive.

ARGUMENT

I

THE APPELLANT WAS DENIED DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS IN BEING COMMITTED TO JAIL AT THE OPENING OF THE TRIAL OF THE ACTION WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD AND WITH GREAT PREJUDICE TO HIM IN THE PREPARATION OF HIS DEFENSE AND IN HIS APPEARANCE BEFORE THE JURY.

BAIL IS A MATTER OF RIGHT UNDER THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND UNDER RULE 46(a), RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES. STACK v. BOYLE, 342 US 1, 96 L.ED. 3.

At the very opening of the trial, on February 21, 1961, the trial judge, without notice, peremptorily ordered the appellant to be committed to jail pending trial. His bail had been reduced and he had been at liberty prior to trial on \$2500 bail. The trial covered a period of months.

Rule 46(a) provides as follows:

"Right to bail.

"(1) Before Conviction. A person arrested for an offense not punishable by death shall be admitted to bail.

A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise

of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

Section 3141 of Title 13 provides:

"Bail may be taken by any court, judge or magistrate authorized to arrest and commit offenders, but in capital cases bail may be taken only by a court of the United States having original or appellate jurisdiction in criminal cases or by a justice or judge thereof."

Section 3142 of Title 13 provides:

"Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his surety, and delivered to the marshal or his deputy, and brought before any judge or other officer having power to commit for such offense; and at the request of such surety, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the

recognizance, or certified copy thereof, the discharge and exoneratur of such surety; and the person so committed shall be held in custody until discharged by due course of law."

Section 3143 of Title 18 provides:

"Additional bail.

"When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof."

There is no provision in either the statute

or rules for committing a person in the federal court into custody pending trial. To do so is to commit a presumptively innocent person into custody:

(a) Thus to prejudice him in the eyes of the jury, who are bound to learn, as in this case, from publicity and otherwise, that the defendant is in custody;

(b) Prejudice him in the preparation of his defense because he is not free to meet with his attorneys and to assist them at all and any time in the preparation of his defense while locked up.

(c) To deny him, a presumptively innocent person, the right to his liberty.

The office of bail in a criminal case is to secure the due attendance of the party accused to answer the indictment and submit to a trial and the judgment of the court thereon.

United States v. Foster, (1943, DCNY),

79 F.Supp. 422 (dealing with a motion for an order permitting defendants, enlarged on bail, to travel beyond the court's jurisdiction, without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be

given effect)

United States v. Parker, (1950, DCNC),
91 F.Supp. 996, affd (CA4th), 104 F.2d
483 (dictum)

United States ex rel. Rubinstein v.
Mulcahy, (1946, CA2d NY), 155 F.2d
1002

The traditional right to bail before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction.

Stack v. Boyle, (1951), 342 US 1, 96 L.ed.
3, 72 S.Ct. 1

Spector v. United States, (1952, CA9th
Cal.), 193 F.2d 1002

Unless this right is preserved the presumption of innocence would lose its meaning.

Stack v. Boyle, (1951), 342 US 1, 96 L.ed.
3, 72 S.Ct. 1

Spector v. United States, (1952, CA9th
Cal.), 193 F.2d 1002

The view has been taken that under the Eighth Amendment to the Federal Constitution, which prohibits excessive bail, there is a qualified constitutional right to bail before trial.

United States v. Fiala, (1951, DC Or.),
102 F.Supp. 399

Right to bail under Rule 46(a)(1).

Rule 46(a)(1), dealing with the right to bail
before conviction, provides as follows:

"A person arrested for an offense
not punishable by death shall be
admitted to bail. A person arrested
for an offense punishable by death
may be admitted to bail by any court
or judge authorized by law to do so
in the exercise of discretion, giving
due weight to the evidence and to the
nature and circumstances of the
offense."

Under Rule 46(a)(1) an accused who has not
yet been brought to trial has an absolute right
to be admitted to bail in a non-capital case.

Stack v. Boyle, 342 US 1, 96 L.ed. 3

Supreme Court:

Stack v. Boyle, (1951), 342 US 1, 96 L.ed.
3, 72 S.Ct. 1

Fourth Circuit:

United States v. Parker, (1950, DCNC),

91 F.Supp. 996, *affd* (CA4th), 134 F.2d
433 (dictum)

Seventh Circuit:

Heikkinen v. United States, (1953, CA7th
Wis.), 203 F.2d 733

United States v. Weiss, (1956, CA7th Ill.),
233 F.2d 463

Ninth Circuit:

Spector v. United States, (1952, CA9th
Cal.), 193 F.2d 1002

The rule demands that the defendant be given
the opportunity to request admission to bail before
a magistrate promptly after his arrest.

Marte v. Government of Guam, (1953, DC
Guam), 115 F.Supp. 524

As a prerequisite to granting bail, the court
may require the accused's personal presence within
the territorial boundaries of its authority.

Meltzer v. United States, (1951, CA9th
Cal.), 133 F.2d 913 (also stating that
there seems to be no constitutional
requirement that any bail be fixed
until the accused is within the juris-
diction of the court of indictment)

The right to release before trial is

conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.

Stack v. Boyle, (1951), 342 US 1, 96 L.ed.

3, 72 S.Ct. 1

Spector v. United States, (1952, CA9th

Cal.), 193 F.2d 1002

A person placed upon bail is free to go and do what he wishes, to meet his attorney at any hour of the day or night and to assist his attorney in getting the evidence together, in locating witnesses and in every step in the preparation of the trial. This right he has if not committed to custody pending trial. He is a presumptively innocent person and should not be denied this right. Only in capital cases has there been an exception and even in these cases a person may be released on bail.

As stated in Rule 46(a)(1), bail in capital cases is a matter of judicial discretion.

See: Ex parte Monti, (1948, DCNY),

79 F.Supp. 651, infra, Sec. 4

The denial, therefore, of bail pending trial was a denial of the right to prepare for trial, a denial and seriously affected the fairness of the preparation and carrying on of the trial and was a denial of due process of law and equal protection of the laws guaranteed by the Fifth Amendment to the Constitution of the United States.

The right to have an attorney of one's choice, well prepared, is a right guaranteed by due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

Powell v. Alabama, 237 US 45, 77 L.ed.

153

In Powell v. Alabama the court said, quoting the words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns" had been repeated in varying forms of expression in a multitude of decisions.

In Holden v. Hardy, 169 US 366, 339, 42 L.ed. 730, 790, the necessity of due notice and opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard" and Mr. Justice Field,

in an earlier case, Galpin v. Page, 13 Wall 350, 363, 369, 21 L.ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has his day in court was "as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard ... What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right".

The judge in Ex Parte Chin Loy You, 223 F. 333, pointed out that the right to be represented by counsel was recognized as an essential to any fair trial of a case against a prisoner.

Due preparation for trial, especially in a case of the magnitude which the instant case presented, requires the defendants to have free movement under bail. As set out in Stack v. Boyle, 342 US 1, 4-5, from the passage of the Judiciary Act in 1739 to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered

preparation of a defense and serves to prevent the infliction of punishment prior to conviction.

Stack v. Boyle, 342 US 4, 5, 96 L.ed. 3

Then the arbitrary revocation of bail at the outset of this trial deprived this appellant of "this traditional right to freedom before conviction" which would have permitted him the "unhampered preparation of a defense" (Stack v. Boyle, 342 US 4, 96 L.ed. 6) and would have also removed the necessary prejudice which his confinement brought about and its effect on the jury. The revocation of bail at the outset of a trial and before conviction is nowhere provided for in the federal rules nor by any act of Congress and if it did so, it would offend the Eighth Amendment to the Constitution of the United States. It results in the arbitrary and capricious confinement of a defendant who is presumptively innocent for the presumption of innocence clothes a defendant before and throughout the trial of the case and until or unless a jury convicts him.

The trial judge arbitrarily ignored this presumption, ignored the psychological and improper effect which this procedure had upon this appellant and the other appellants, who were likewise jailed,

and deprived him of that traditional freedom necessary to prepare his full defense, to confer freely with counsel of his choice at the place or places where his counsel wanted to meet him and see him and without the necessity of conferring during the limited hours provided for in confinement and while one is in custody and without the privacy one is entitled to have if he is on bail and confers with his own attorney. This procedure and proceeding, therefore, deprived the appellant of rights guaranteed by the Constitution of the United States, deprived him of the right properly to prepare for and present his trial and therefore denied him due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

II

SECTION 1951 OF TITLE 18, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. CONGRESS HAS NOT INTENDED TO INCLUDE BOXING AND PRIZE FIGHTING WITHIN THE MEANING OF SECTION 1951, TITLE 18. BOXING IS A LOCAL AFFAIR AND CONGRESS HAS NOT LEGISLATED IN THIS SECTION TO COVER BOXING OR PRIZE FIGHTING. THE STATUTE, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, INsofar AS BOXING AND PRIZE FIGHTING ARE CONCERNED, IS SO VAGUE, INDEFINITE AND UNCERTAIN AS TO CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Section 1951 of Title 18 was aimed at labor

racketeering. All of the reported cases under the Hobbs Act (Title 18, section 1951) involve labor union racketeering, at least up to 4 L.ed.2d, page 1846.

Congress had no intention to include boxing within the scope of the federal laws any more than baseball.

A boxing match 'is of course a local affair'.

United States v. International Boxing

Club of New York, 348 US 236, 99 L.ed.

290

It is like the showing of a motion picture.

United States v. Crescent Amusement Co.,

323 US 173, 183, 89 L.ed. 160, 168

Or the performance of a vaudeville act.

Hart v. B.F. Keith Vaudeville Exch., 262

US 271, 67 L.ed. 977

Or the performance of a legitimate stage attraction.

United States v. Shubert, 348 US 222,

99 L.ed. 279

Congress had no more intention of including this type of sport or enacting it into a federal crime than it did baseball.

Toolson v. New York Yankees, Inc., 346 US

346, 98 L.ed. 64

United States v. Shubert, 348 US 222,
99 L.ed. 279

Boxing is merely entertainment in a different guise and as Justice Frankfurter points out in his opinion in United States v. International Boxing Club, 348 US at page 243, and as Justice Minton points out at page 251, it can be adequately dealt with by local authorities.

As stated by Justice Minton in his dissenting opinion in United States v. International Boxing Club, 348 US at 251, "In the Baseball Case, this Court held that traveling from State to State to play the game and all the details of arrangements were incident to the exhibition. In Toolson v. New York Yankees, Inc., 346 US 356, 98 L.ed. 64, 74 S.Ct. 78, we did not overrule the Federal Baseball decision; in fact, we reaffirmed the holding of that case ... As I see it, boxing is not trade or commerce. There can be no monopoly or restraint of nonexistent commerce or trade. Whether Congress can control baseball and boxing I need not speculate. What I am saying is that Congress has not attempted to do so."

We likewise state that Congress did not attempt

to aim at boxing in connection with its anti-racketeering statute and that boxing is not intended to become a part of the anti-racketeering statute governed by section 1951 of Title 18, U.S. Codes. We therefore ask this Court to so construe section 1951 of Title 18.

Title 18, section 1951, known as the Hobbs Act, only aims at interference with interstate commerce. As stated in Stirone v. United States, 361 US 212, 4 L.ed. 2d 252, "The charge that interstate commerce is affected is critical since the federal government's jurisdiction of this crime rests only on that interference." Nowhere in the Hobbs Act is prize fighting or boxing defined as commerce nor is there anywhere in the Act any discussion which indicates that Congress intended boxing and prize fighting to be within the purport of the Act. In the discussion of the Stirone case, 4 L.ed.2d at 1846, it was stated, "The reported cases decided under the Hobbs Act all involve representatives or officials of labor unions." There follows a series of citations of cases involving labor unions or their officials. If Congress had intended boxing or prize fighting to come within the broad terms of the Act, it was not tongue-tied

nor pen-tied to define it.

Statute Indefinite in Respect to Boxing

Section 1951 does not include boxing as commerce.

A criminal statute which is so vague, indefinite and uncertain as to fail to set up a clear standard of guilt violates the Fifth Amendment to the Constitution of the United States.

Winters v. New York, 333 US 507, 509, 510,
92 L.ed. 340, 846, 347

M. Kraus & Bros. v. United States, 327 US
614, 90 L.ed. 894

United States v. Sullivan, 332 US 639,
92 L.ed. 297

Musser v. Utah, 333 US 95, 92 L.ed. 562

Connally v. General Construction Co., 269
US 335, 70 L.ed. 322

Lanzetta v. New Jersey, 306 US 451, 33
L.ed. 333

Williams v. United States, 341 US 97,
95 L.ed. 774

United States v. L. Cohen Grocery Co.,
255 US 71, 65 L.ed. 516

In Musser v. Utah, a conviction on a charge of conspiring to commit acts injurious to public

morals was set aside for lack of definiteness.

In the context of criminal prosecution we must apply the rule of strict construction when interpreting a regulation or statute.

United States v. Halseth, 342 US 277, 230,
96 L.ed. 300

III

SECTION 1951 OF TITLE 13, INHERENTLY AND AS
CONSTRUED AND APPLIED IN THIS CASE, VIOLATES THE
TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED
STATES.

This section reads as follows:

"1951. Interference with commerce
by threats or violence.

"(a) Whoever in any way or degree
obstructs, delays, or affects commerce
or the movement of any article or com-
modity in commerce, by robbery or
extortion or attempts or conspires
so to do, or commits or threatens physi-
cal violence to any person or property
in furtherance of a plan or purpose
to do anything in violation of this
section shall be fined not more than
\$10,000 or imprisoned not more than

twenty years, or both.

"(b) As used in this section --

"(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all

commerce between any point in a State, Territory, Possession, or the District of Columbia, and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

"(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-183 of Title 45."

During the oral argument in the recent case of Toles v. United States, counsel for appellant pointed out to this court the growing expansion of the offenses that are actually State offenses into the field of the federal courts with the result that federal courts have been degraded into superior courts and police courts. The Tenth Amendment did not contemplate that the police powers of the federal government should expand into this area. Section 1951 apparently was aimed at labor unions and labor union racketeering.

Boxing and prize fighting are not commerce

within the meaning of the commerce clause of section 1951 of Title 18 and the statute therefore does not apply to the offenses charged herein and for which the appellant was convicted.

The Tenth Amendment forbids the federal government from invading the States with local offenses. The police powers of the federal government were only meant to protect interstate commerce as such and not local boxing or other local exhibitions.

Nick v. United States, 122 F.2d 660

IV

SECTION 375 OF TITLE 18, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, VIOLATES THE FIFTH AND TENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Again we urge that boxing and prize fighting is not commerce within the meaning of interstate communications and that section 375 of Title 18, inherently and as construed and applied in this case, is not within the scope of federal statutes or federal regulations in that Congress did not intend it to be.

Tenth Amendment to the Constitution of
the United States

Nick v. United States, 122 F.2d 660

Toolson v. New York Yankees, Inc., 346 US

356, 93 L.ed. 64

United States v. Shubert, 348 US 222,

99 L.ed. 279

Stirone v. United States, 361 US 212,

4 L.ed.2d 252

Likewise, section 875 of Title 18 does not include any definition of any communications relating to boxing or prize fighting as commerce and is not within the definition of commerce.

V

SECTION 371 OF TITLE 18, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, VIOLATES THE FIFTH AND TENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND DUPLICATES THE CHARGE CONTAINED IN TITLE 18, SECTION 1951, WHICH IS EXCLUSIVE.

Section 371 of Title 18 (62 Stat. 701) is a conspiracy statute. Title 18, section 1951 (62 Stat. 793) provides for punishment for anybody who conspires or attempts to commit the offenses set forth therein. Therefore, the defendants were charged with two conspiracies. In selecting the charge on which the prosecution intended to proceed under Title 18, section 1951, we respectfully urge upon the Court that the prosecution was put to an

election as to whether, if the statute is constitutional inherently and as construed and applied, to elect whether to proceed to charge the completed offense or a conspiracy, since Congress has included both elements in a specific statute of Title 18, U.S. Codes, section 1951. Under the facts of this case, if any crime occurred and was within the jurisdiction of the federal court, the alleged conspiracy necessarily merged with the completed offense and in such a case both could not be charged and tried without subjecting the defendant to double jeopardy on it.

"There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See United States v. Katz, 271 US 354, 355, 356, 70 L.ed. 986, 987, 988, 46 S.Ct. 513; Gebardi v. United States, 237 US 112, 121, 122, 77 L.ed. 206, 210, 211, 53 S.Ct. 35, 34 ALR 370."

Pinkerton v. United States, 323 US 640,
90 L.ed. 1489

In People v. Stephens, 79 Cal. at 432, the court said "The law does not permit a single individual act to be divided, so as to make out of it two distinct indictable offenses. (Drake v. State, 60 Ala. 43.) Although when a man has done a criminal act, the prosecutor may carve as large an offense out of the transaction as he can, yet he is not at liberty to cut but once. Here the essential ingredient of the offense was the publication of an article containing several alleged libels. There was but one criminal offense, and that cannot be split up and prosecuted in parts without violating the rule of law, 'That a man shall not be twice vexed for one and the same cause'."

Fifth Amendment to the Constitution of the
United States

Green v. United States, 355 US 184, 139,
2 L.ed.2d 199, 205

WHEREFORE, appellant prays for reversal of the judgments on each of the counts of the indictment and for an order directing the dismissal of the causes for want of jurisdiction of the United States courts.

The appellant adopts each and all of the other points of other counsel insofar as they are applicable to him and are in furtherance of a reversal of the judgments as to him.

Respectfully submitted,

MORRIS LAVINE

JACOB KOSSMAN

Attorneys for Appellant
FRANK PALERMO

No. 17762

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENT TO OPENING BRIEF OF
APPELLANT PAUL JOHN CARBO

APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

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No. 17762

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, et al. ,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

SUPPLEMENT TO OPENING BRIEF OF
APPELLANT PAUL JOHN CARBO

SUPPLEMENT TO
SPECIFICATIONS OF ERROR

14. The trial court erred in instructing the jury that
(RT 7635):

"If I am wrong in what I tell you and it is a serious matter -- if it is just trivia I might get a little reprimand for it from a higher court, but if it is just trivia it is not fatal to your verdict. If I seriously misinstruct you, then any verdict you return would be vitiated. In other words, my word is subject to a review by higher courts; yours is not."

The error of this instruction was pointed out to the court in

appellant's motion for new trial as follows (CT 1046):

"The psychological impact of such an instruction is to lull the jury into a sense of apathy: it really doesn't matter what you do, the appellate court will take care of it. Since it is generally known that only if there is a guilty verdict can there be an appeal, the instruction plainly suggests to the jury that it return a guilty verdict. "

15. The trial court erred in instructing the jury that

(RT 7654):

" . . . It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid. " (emphasis added).

The error of this instruction was pointed out to the court in appellant's motion for new trial as follows (CT 1047):

"This instruction was erroneous, since it is the law that the overt act must have been done or committed -- as alleged in the indictment -- by one of the conspirators, not by some one else. "

SUPPLEMENT TO ARGUMENT

XII.

A TRIAL COURT'S ADVISING A JURY THAT
ITS VERDICT IS SUBJECT TO REVIEW BY A
HIGHER COURT DEPRIVES THE DEFENDANT
OF A FAIR JURY TRIAL.

A virtually identical instruction to that quoted above at page 1, under Specification of Error No. 14, was held to be erroneous and prejudicial and the judgment was reversed in United States v. Fiorito, 300 F.2d 424 (CA 7 1962). There the instruction was (page 426):

" . . . That's why we have a court of appeals, they will reverse me if I'm wrong. This is not the final judgment, there is a court of appeals to review me and a Supreme Court to review them. That's why we have a great system here. "

Said the appellate court of this instruction (page 427):

" . . . [I]t was inferred that the jury's determination was not to be the final one but would be reviewed by this Court and the United States Supreme Court. Such dilution of the final responsibility of the jury as was thus inferred as permissible to the jury in its determination of the verdict is prejudicial to a defendant. . . . "

In the words of one of the cases relied upon by the court in Fiorito (People v. Johnson, 284 N. Y. 192, 30 N. E. 2d 465, 467), such an instruction "vitiates the trial".

XIII

IN ORDER TO CONSTITUTE THE CRIME
OF CONSPIRACY, THE OVERT ACT MUST
BE PERFORMED BY ONE OF THE CONSPIRATORS.

The court instructed the jury (RT 7654) that the overt acts need not be performed by any of the alleged co-conspirators but could be performed by a third person "at (the conspirators') direction or with their aid". See page 2, supra, under Specification of Error No. 15.

This was an incorrect instruction as to the law of conspiracy and flies directly in the teeth of the statute. 18 USC 371 (62 Stat. 701), provides that "if two or more persons conspire to commit any offense . . . and one or more of such persons do any act to effect the object of the conspiracy . . . " (emphasis added), the crime is committed. This is plain language and does not permit of the construction that a third person, not an alleged co-conspirator, can commit the overt act. That act must be committed, before there can be the crime of conspiracy, by a co-conspirator (Yates v. United States, 354 U.S. 298, 334).

Of course, it is the law that not all the co-conspirators need commit the overt act (United States v. Rabinowich, 238 U.S. 78, 59 L. Ed. 1211, 1214). So long as there is a conspiracy and

the defendant is a part of it, he is bound by the overt acts committed by any one of the co-conspirators (Bannon v. United States, 156 U.S. 464, 468-9; 39 L.Ed. 494, 496). But, and precisely because of such, what might be termed, vicarious liability, the overt act which will accomplish such binding must be the act of a co-conspirator and not the act of some one else (Yates v. United States, supra; Herman v. United States, 289 F.2d 362, 368 [CA 5 1961], cert. den. 368 U.S. 897).

Not only was the instruction erroneous, 1/ but since the court correctly instructed (RT 7652) that it was necessary "to prove . . . that one or more of the parties engaging in the conspiracy has committed some act to effect the object thereof" (emphasis added), the giving of the erroneous instruction could only create confusion in the minds of the jury: on the one hand (RT 7652), the court instructed that the overt act must be committed by a co-conspirator; on the other (RT 7654), that it could be committed also by some one else.

1/ A like error was committed when the court instructed (RT 7789) that the Daly-Leonard conversation (overt act u. in Count I [CT 5]) could be considered by the jury if "Daly was either a coconspirator . . . or . . . an agent, that is that he was one who was acting for one of the conspirators" (emphasis added). This is discussed at pages 55-56 of the Opening Brief of Appellant Gibson.

CONCLUSION

The judgments should be reversed.

Respectfully submitted,

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Paul John Carbo

No. 17762
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, FRANK PALERMO, JOSEPH SICA,
LOUIS TOM DRAGNA, AND TRUMAN K. GIBSON, JR.,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 17762

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, FRANK PALERMO, JOSEPH SICA,
LOUIS TOM DRAGNA, AND TRUMAN K. GIBSON, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

STATEMENT OF JURISDICTION.

Appellants were indicted by the Grand Jury in and for the Southern District of California, Central Division, on September 22, 1959, being variously charged thereby in ten counts alleging violations of Title 18, United States Code, Sections 1951, 371, and 875(b). [I C.T. 2-16.]†

All appellants were tried and convicted by a jury as charged in the foresaid indictment on May 30, 1961. [IV C.T. 951-960.] On December 2, 1961, all appellants were adjudged guilty upon their pleas of not guilty and the jury verdicts of guilty and they were sentenced as provided by law. [VI C.T. 1494-1500.]

†C. T. signifies Clerk's Transcript which comprises ten volumes.

Timely notices of appeal were filed by each of the appellants from the several judgments of conviction of December 2, 1961. [VI C.T. 1515-1524, 1532-1533.]

The United States District Court for the Southern District of California had jurisdiction of the causes of action upon which the judgments appealed from were entered, pursuant to Title 18, United States Code, Section 3231.

This Court has jurisdiction to entertain these several appeals and to review the several judgments of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294(1).

II. STATEMENT OF THE CASE.

The five appellants were indicted variously in a ten-count indictment by the Grand Jury for the Southern District of California, sitting at Los Angeles, on September 22, 1959. Carbo was charged in five counts alleging violations of 18 U. S. C. §§1951, 371, and 875(b); Palermo was charged in six counts alleging violations of 18 U. S. C. §§1951, 371, and 875(b); Sica was charged in three counts alleging violations of 18 U. S. C. §§1951 and 371; and Dragna and Gibson were each charged in two counts alleging violations of 18 U. S. C. §§1951 and 371. [I C.T. 2-16.]

Extensive pre-trial proceedings were had including the entertaining by the District Court (the Honorable Ernest Tolin, United States District Judge) of various motions by the five appellants. [See Clerk's Transcript generally from I C.T. 44 through II C.T. 472.]

The beginning of the trial was substantially delayed by the unsuccessful efforts of Carbo to obtain an or-

der quashing the writ of *habeas corpus ad prosequendum* issued by the District Court to Carbo's jailer in the City of New York.

Carbo v. United States, 277 F. 2d 433 (9 Cir. March 23, 1960), affirmed 364 U. S. 611 (January 9, 1961).

The trial commenced on February 21, 1961, at which time, on motion of appellee, the District Court (the Honorable Ernest Tolin) exonerated the bonds of the appellants Carbo, Palermo, Sica, and Dragna and remanded them into custody in order to avoid interference by them with the orderly process of the trial. (Appellant Gibson was briefly committed to custody at the same time; however, the order committing Gibson was vacated by the trial judge the day it was entered. [II C.T. 486-487.]) While the trial was in progress, Carbo, Palermo, Sica, and Dragna prosecuted two separate appeals in this Court seeking to obtain reinstatement of bail prior to conviction. In the first of these appeals, this Court held that the District Court possessed the inherent power to commit the appellants in order to maintain the orderly process of trial; however, this Court found that the brief record on the first day of trial did not justify the action of the District Court.

Carbo v. United States, 288 F. 2d 282 (9 Cir. March 3, 1961).

After additional evidence was adduced on the bail question in the District Court, the four incarcerated appellants were again denied bail by the trial court. This action was affirmed in this Court.

Carbo v. United States, 288 F. 2d 686 (9 Cir. March 15, 1961), *cert. den.* 365 U. S. 861 (March 27, 1961).

The trial concluded with the jury finding the five appellants guilty as charged in the indictment on May 30, 1961. [IV C.T. 951-960.]

After the verdicts were received, the District Court denied the pending motions for judgments of acquittal of appellants Carbo, Palermo, Sica, and Gibson and set hearing on all other motions, pending and to be filed, for June 20, 1961. [IV C.T. 950, 980.]

On June 11, 1961, Judge Tolin died. On June 26, 1961, Chief Judge Peirson M. Hall entered an order designating the Honorable George H. Boldt, United States District Judge for the Western District of Washington, to hear and dispose of any and all matters which remained to be disposed of in the case. [IV C.T. 1084.]

On July 24, 1961, Judge Boldt heard argument upon all pending post conviction motions and adjourned the case *sine die* for ruling thereon and for imposition of sentence (in the event the motions of the appellants were denied) in order to have an opportunity to acquaint himself fully with the entire record in the case. [See generally Volume 51 of the Reporter's Transcript of Proceedings, July 24, 1961.]

On October 13, 1961, Judge Boldt denied appellants' supplemental motions for new trial. [VI C.T. 1342-1344.]

On November 28, 1961, Judge Boldt signed a Memorandum Order setting forth his findings and tentative

ruling with respect to the pending motions of all appellants. This order invited all parties to submit further memoranda and oral argument if they so desired at or before the hearing on the motions, December 2, 1961. [VI C.T. 1446-1448.]

On December 2, 1961, Judge Boldt heard further argument upon the pending motions which were denied at the conclusion of argument. At this time, the District Court adopted the GOVERNMENT'S MEMORANDUM OF POINTS AND AUTHORITIES CONCERNING CERTAIN CONTENTIONS OF ERROR RAISED BY DEFENDANTS IN THEIR MOTIONS FOR NEW TRIAL "as being substantially and barring some possible suggestion of argumentation, a true analysis of the record" which conformed "entirely to my own views of it." [VI C.T. 1450-1490; 52 R.T. 8000-8001.]† In accordance with his Memorandum Order [VI C.T. 1447] and his remarks in open court on December 2, 1961 [52 R.T. 8002], Judge Boldt filed an Abstract of Testimony comprising ten volumes which summarized all of the trial proceedings. [VI C.T. 1565. See generally Volumes I-VI, Abstract of Testimony.]

On January 22, 1962, this Court denied the motions of appellants Carbo and Sica for bail pending appeal

†R.T. signifies Reporter's Transcript of Proceedings which comprises fifty-two volumes.

without prejudice to renewal thereof after reconsideration of such motions in the District Court.

Carbo v. United States, 300 F. 2d 889 (9 Cir. January 22, 1962).

Upon reconsideration of his earlier denial of bail pending appeal, Judge Boldt again denied Carbo's and Sica's motions on February 5, 1962. [VI C.T. 1584.]

On February 13, 1962, this Court affirmed Judge Boldt's denial of bail pending appeal to Carbo and Sica.

Carbo v. United States, 302 F. 2d 456 (9 Cir. February 13, 1962).

On March 19, 1962, Mr. Justice Douglas denied bail to Carbo "in the public interest" and set bail for Sica in the amount of \$50,000 with substantial limitations upon his conduct while at large.

Carbo v. United States, 82 S. Ct. 662, 7 L. ed. 2d 769 (March 19, 1962);

Sica v. United States, 82 S. Ct. 669, 7 L. ed. 2d 778 (March 19, 1962).

The five appellants have filed seven interdependent opening and supplementary opening briefs on the merits of this case.

III.

STATUTES AND RULES INVOLVED.

Title 18, United States Code, Section 1951, provides in pertinent part as follows:

“(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

“(b) As used in this section—

* * * * *

“(2) The term ‘extortion’ means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

“(3) The term ‘commerce’ means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.”

* * * * *

Title 18, United States Code, Section 371, provides in pertinent part as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.”

* * * * *

Title 18, United States Code, Section 875(b) provides as follows:

* * * * *

“(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.”

* * * * *

Rule 25 of the Federal Rules of Criminal Procedure provides as follows:

“If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satis-

fied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.”

Rule 30 of the Federal Rules of Criminal Procedure provides as follows:

“At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.”

IV.

INTRODUCTION TO STATEMENT OF FACTS.

This is a direct evidence case, corroborated by compelling circumstantial evidence.

Four of the appellants voluntarily took the witness stand during presentation of the defense. Analysis of their testimony, without more, illustrates the operation of the conspiracy and establishes beyond cavil, the guilt of the appellants. Moreover, cross-examination of

the appellants elicited testimony showing similar acts and a common scheme and plan antedating the first overt act referred to in the indictment.

The indictment relates to attempts by the appellants to perpetuate their control of the welterweight championship. It was charged and proved that the appellants conspired to achieve this objective by the use of physical and economic threats against Jack Leonard, a promoter and matchmaker, and Donald Nesseth, manager of welterweight Don Jordan. At the outset, the threats were directed toward outright control of Jordan and, in the end, toward compelling Nesseth to agree to match his champion Jordan with Sugar Hart in a title fight.

The position of appellant Truman K. Gibson, Jr., is crucial in the structure of the conspiracy. Gibson, an attorney and member of the bar of the State of Illinois, first became directly involved with professional boxing in 1949. Prior to that year, Gibson's connection with boxing stemmed from his professional representation of heavyweight champion Joe Louis. [32 R.T. 4707-4710.] In 1949, Louis, in the twilight of his career, was anxious to retire, but in doing so, wanted to capitalize on his national prominence and bow out with some assurance of continuing profits predicated upon his long tenure as heavyweight champion of the world. Consequently, Gibson conceived a plan the object of which was to control the heavyweight championship through a business organization known as Joe Louis Enterprises. [32 R.T. 4707-4710.]

An appreciation of what transpired prior to October, 1958, requires an understanding of what motivated the

appellants' conduct in this case. This "mens rea" element was established, particularly in the direct and cross-examination of defense witnesses, including four of the appellants, demonstrating that "control" of champions and top contenders was the only significant profit factor in the operation of the boxing business. The evidence shows that "control" was effected and maintained through matching controlled fighters with one another and that the technique for obtaining this control was to capture the fight manager through use of economic and, as a last resort, physical coercion.

This case demonstrates the operation of both techniques, and, as the appellant Palermo himself acknowledged on the witness stand, "*. . . We have been doing this for years. This is the first time this kind of case ever came about.*" [40 R.T. 5985.]

Appellee respectfully requests the Court, in analyzing the evidence, to take note of the divergent backgrounds of the appellant Gibson on the one hand, and the appellants Carbo, Palermo, Sica and Dragna on the other. Gibson was a highly educated and resourceful member of the bar and, *according to Gibson's Opening Brief* [Gibson Op. Br. 6] (although not proven during the trial), a community leader, experienced in political affairs and government and highly skilled in the art of persuasion. The other appellants, particularly Carbo and Palermo, were furtive and sinister in the day-to-day conduct of their business affairs. They were without offices or roots in any community in this country and employed crude methods in their acquisition of money and economic power in boxing. The ends of both groups were the same, although the casual observer

would conclude that, despite agreement on ends, they could never agree upon means. Yet this is what happened, and this is what was proven in this classic criminal case now before the bar of this Honorable Court.

The execution of the conspiracy charged in the indictment was facilitated by the business policies of the International Boxing Clubs of which Gibson was at all times the operating head. It was conclusively proven that Gibson used Carbo and Palermo in the operation of his business and, conversely, it was shown that Carbo and Palermo used Gibson and the I.B.C. in *their* extortive activity. [34 R.T. 5050; 35 R.T. 5127, 5130-5136, 5138.]

It is in this frame of reference that Leonard Blakely, referred to herein as Jack Leonard (under which name he had fought professionally), and Donald Nesseth, manager of welterweight Don Jordan, became victims of the conspirators.

During the period October 23, 1958, to September 22, 1959, Nesseth and Leonard were subjected to mental torment and abuse resulting from repeated economic and physical threats. When the pressures became intolerable the terrorized victims were afforded relief and protection through the intercession of the police and the Federal Bureau of Investigation, from whom they had requested aid.

Although appellee refers to this as "a classic case", it is the Government's contention that there are no unique principles of law involved. The case is unique and "classic" only because it is not a vicarious prosecution. Unlike most prosecutions involving organized

crime, this prosecution attacked the organized criminal activity itself rather than the collateral conduct of the participants for income tax evasion, contempt, or perjury.

It should be emphasized in conjunction with these prefatory remarks that the evidence about events which predate the first overt act alleged in the indictment is in the record because the appellants chose to call witnesses, who had been closely associated with them. Also, because appellants Gibson, Palermo, Sica and Dragna testified in their own defense and clearly revealed the common scheme and plan which provided the framework for their joint criminal activity.

V.

STATEMENT OF FACTS.

A. The Years 1950 to 1957—The Period of Indifference.

In 1949, appellant Truman K. Gibson, Jr., persuaded the Norris-Wirtz business interests in Chicago of the efficacy of his plan [32 R.T. 4706-4709] to use an existing corporate entity, Joe Louis Enterprises, as a basis for a new type of operation which would match top contenders in elimination bouts for the heavyweight crown of retiring Joe Louis. [32 R.T. 4707-4710.]

It was part of this arrangement that the contenders: Ezzard Charles, Lee Savold, Gus Lesnevich, and Joe Walcott, would sign exclusive contracts with Joe Louis Enterprises. [32 R.T. 4710.] Subsequently, these exclusive contracts were to be assigned to the newly formed International Boxing Club of Illinois which was to operate in conjunction with the established Chicago

Stadium Corporation. Shortly thereafter, the International Boxing Club of New York was formed and operated with the Madison Square Garden Corporation. [32 R.T. 4711-4712.]

When Gibson sought out the Norris-Wirtz group with his project, the latter already owned the Chicago Stadium, the Detroit Olympia, and the St. Louis Arena. [32 R.T. 4705-4707.] After the International Boxing Club of New York was formed, it obtained the exclusive right to promote prize fights in Madison Square Garden. [32 R.T. 4712.] By 1950, the Twentieth Century Sporting Club had gone out of existence due to Mike Jacobs' heart attack. [32 R.T. 4712-4714.] Consequently, the International Boxing Club of New York and the International Boxing Club of Illinois were on the scene as powerful promotional organizations with exclusive access to the large boxing arenas in four principal American cities: New York, Chicago, Detroit, and St. Louis. Although appearing to be separate corporate entities, I.B.C. of N.Y. and I.B.C. of Ill. were operated by the same officers [32 R.T. 4718] and they followed a practice of negotiating exclusive service contracts with world champions. [32 R.T. 4724-4726.]

The practice of acquiring exclusive service contracts continued until some time after the decision of United States District Judge Sylvester Ryan in March, 1957, in *United States of America v. International Boxing Clubs* [32 R.T. 4724-4726; 150 F. Supp. 397] which was subsequently affirmed by the United States Supreme Court in *International Boxing Clubs v. United States of America*, 358 U. S. 242 (1959). Gibson acknowledged on the witness stand that it was one of

Judge Ryan's findings, concurred in by the Supreme Court of the United States, that a purpose of the International Boxing Clubs of New York and Illinois was to require a *contender* to sign an exclusive service contract before he could obtain a title fight. [32 R.T. 4725.] Gibson testified that every heavyweight champion since Joe Louis had an exclusive service arrangement with the International Boxing Clubs, until Judge Ryan's decree and the Supreme Court's affirmance compelled termination of that practice. [32 R.T. 4702-4703.] As a consequence of this "business practice", top contenders either fought for I.B.C or did not get a title fight at all. Thus, I.B.C and Gibson took credit for Nesseth's fighter, Don Jordan, becoming the number one contender and, according to Gibson, they arranged it. [32 R.T. 4704.]

Gibson's first contact with the appellant Carbo came shortly after I.B.C. was organized sometime in 1950. [30 R.T. 4516-4517; 32 R.T. 4755-4757.] And their relationship became sufficiently congenial and personal for Carbo to telephone his congratulations to Gibson eight years later when Gibson was elected President of I.B.C. [30 R.T. 4517.] Gibson quibbled over the true character of his relationship with Carbo and endeavored to draw a distinction between "knowing" Carbo and "meeting" Carbo. In any event, Gibson "met" with Carbo on occasion during the period 1950 through 1958, and engaged in telephone conversations with him. [32 R.T. 4755-4757.]

Documentary evidence establishes that at least during the period 1954 to 1957 a more formal relationship existed between the organization operated by Gibson and the interests represented by Carbo. This relationship

is memorialized in the books of the Nevill Advertising Agency, also a Norris-Wirtz enterprise [32 R.T. 4759-4763], which obtained its funds from another Norris-Wirtz enterprise known as Telradio which, in turn, was the contracting party (in lieu of I.B.C. of Illinois) for the weekly Wednesday night telecast by the American Broadcasting Company network. [32 R.T. 4728.]

In the effort to conceal any connection between the I.B.C. organization and Carbo, payments to Carbo were made in the maiden name of Carbo's wife, Viola Masters. Gibson had obtained the statistical information from this I.B.C. "employee" which was essential to formalize "salary" payments to her. At the time this testimony was given, Viola Masters Carbo was seated in the first row of the courtroom behind the defense table and Gibson identified her as the person he had interviewed in Chicago prior to the first payment in 1954. [32 R.T. 4763-4766.] The employment relationship was itself fictitious, although Gibson endeavored to justify it with the explanation that it was for the "orderly presentation of unfixed fights on television." Norris and Gibson had discussed this and decided to make the payments so as not to "antagonize or alienate" any of the fighters or managers with whom Carbo had "influence". Consequently, Carbo was paid until 1957, the year of the District Court decree referred to above. [32 R.T. 4765-4766.] In substance, Gibson testified that this was necessary to assure the business success of the I.B.C.

Approximately \$40,000 was paid to Carbo in this fashion and Gibson acknowledged it was for Carbo's good will. [32 R.T. 4767-4769.] When pressed for an explanation before the United States Senate of why the

I.B.C. hired Mrs. Carbo instead of Carbo himself, Gibson had said it was, "Because it looked a little bit better on our records, not ever considering the possibility of being called before a Senate investigative committee, to have Viola Masters down instead of Frank Carbo." [32 R.T. 4769-4770.] That Gibson knew the payments were made for the benefit of Carbo is uncontroverted and it is admitted that he knew from the outset that the "Viola Masters" he was putting on the books was Mrs. Frank Carbo. She had been introduced to him as Mrs. Frank Carbo. [32 R.T. 4771-4773.] Although, at trial, Gibson endeavored to place the responsibility for the payments upon James Norris, he had already acknowledged to the United States Senate that he, Gibson, had made the payments or caused them to be made. [32 R.T. 4771-4773.]

During this period 1950 to 1957, many of the persons who were called as defense witnesses were in contact with the appellants Gibson, Carbo and Palermo. In 1956, Bernard Glickman, for example, purported manager of Virgil Akins, later to be welterweight champion, "loaned" \$10,000 in cash to Carbo. The money was called for by an unknown messenger named "Mike." [Referred to below. 29 R.T. 4270-4271.] Glickman testified, on cross-examination, that he had simply handed \$10,000 in cash to Carbo's messenger and had not obtained any evidence or token of the debt in exchange therefor.

Palermo, too, was on the receiving end of substantial payments of money in connection with his relationship to the appellant Gibson. [See Section C, below.]

On March 8, 1957, the United States District Court for the Southern District of New York rendered its

decision in *United States of America v. International Boxing Clubs* [150 F. Supp. 397] and held that the defendants in that case were violating the federal anti-trust laws and that monopoly practices therein referred to must be discontinued. Separation of the International Boxing Club of New York and the International Boxing Club of Illinois was decreed, and the defendants therein were ordered to discontinue the practice of requiring exclusive service contracts as a condition to their negotiations with fighters and in the promotion of nationally televised championship fights. [32 R.T. 4718, 4720, 4725.] This led to the second phase of activity which is discussed in the following section.

B. March, 1957, to October, 1958—The Agonizing Reappraisal and Emergence of the Conspiracy.

Preface

During the eighteen-month period between the District Court decree in New York and the commission of the first overt act against the victims in the instant case, Gibson, as operating head of the I.B.C., endeavored to adjust to the new situation. The evidence adduced at trial disclosed that this adjustment included: (1) an effort to extend I.B.C. jurisdiction to the West Coast in the guise of the Hollywood Boxing and Wrestling Club; and (2) a closer working alliance with the underworld, mainly Carbo and Palermo, as a result of the banning of exclusive service contracts.

During January of 1958, appellants Carbo and Gibson met in the Roosevelt Hotel in New York. Their

discussions included the subject of the forthcoming elimination fight between Logart and Akins for the welterweight title (the object of control in the instant case when Jordan became welterweight champion.) Gibson had acknowledged before the United States Senate that Carbo's activities in connection with that fight had cost his organization between \$10,000 and \$15,000. At the trial, Gibson admitted he had so testified but insisted that he was merely "stating a conclusion that was passed on" by others in the I.B.C. [32 R.T. 4773-4776.] Gibson did admit that he told Carbo that he "wanted to see Akins involved in a championship fight" and that Carbo replied, "[W]ell, it is O.K., fine." [32 R.T. 4758.]

Toward the middle of 1958, Gibson was advised by his Friday night sponsor, the Gillette Company, of its desire for a championship fight on television to launch its father-son Christmas selling campaign. This was important to Gillette and consequently Gibson told Bernard Glickman, manager of Akins, to keep his welterweight champion available. [32 R.T. 4779-4782.] Gibson had testified before the United States Senate that Glickman was a Carbo-controlled manager and that, "I could go a little further with Glickman because of his own statements. He has said that he did consult with Carbo in the managing of matches. . . ." [32 R.T. 4777-4778.] At the trial, however, Gibson insisted that these statements had not been made to him personally but had appeared in the public press. [32 R.T. 4778.]

In January of 1957, Gibson had brought Jack Leonard to see Carbo at a night club in New York which was owned by one of Kid Gavilan's managers,

Angel Lopez. [5 R.T. 609-611.] Leonard had first met Carbo in Chicago in 1956 when he was introduced to Carbo by unindicted co-conspirator William Daly on the occasion of the Patterson-Moore fight. At that time, Leonard was the matchmaker for Hollywood Post 43 of the American Legion at the Hollywood Legion Stadium. [5 R.T. 608-609.] On the occasion of Gibson's taking Leonard to see Carbo in New York, he told Leonard that "he didn't like to deal with people like Mr. Carbo" but if Leonard wanted to be successful in business, he would have to get to know Carbo, that this would be better for Leonard's business. Gibson and Leonard were accompanied by Lester Malitz, another defense witness. [5 R.T. 609-611; 34 R.T. 5021-5023.]

In February of 1958, Chris Dundee, a defense witness, and promoter in Miami, Florida, telephoned Gibson concerning closed circuit television rights to the Basilio-Robinson fight. In the course of the conversation, Dundee, in accordance with Carbo's practice [see Section C, below], put Carbo on the telephone. After his talk with Carbo, Gibson testified that he said to Dundee, "Chris, what the hell do you mean trying to put *pressure on us* this way." [33 R.T. 4942, Emphasis supplied.]

During this period Carbo himself was extremely active in matters involving professional boxing and in which, according to the evidence, he had no legitimate concern. On March 19, 1958, Carbo, Palermo, and others were attending a party at Goldie Ahern's Restaurant in Washington, D. C. Carbo told Palermo to telephone Jackson 2-9456 in Houston, Texas, listed to Lou Viscusi, manager of lightweight champion Joe Brown.

Palermo made the telephone call from a public telephone and returned to Carbo's table where he reported to Carbo that he had demanded \$2,000 right away and that he had frightened the person who was on the telephone. Palermo added that he had been told by the recipient of the call that the latter did not have any money and Palermo bragged that he had told him to "look in the drawers, you know where to find it." Carbo then, following a practice referred to herein in connection with death threats to Leonard [see Section C, below], followed Palermo to the telephone where he proceeded to engage in conversation. [15 R.T. 2258; 37 R.T. 5458-5461, 5481; 16 R.T. 2328-2331; 33 R.T. 4943-4946; Exs. 100-102, 176, 101-A for Ident. at p. 11.]

Carbo also reassured Palermo during the party at Goldie Ahern's that he had talked to the aforementioned Bernard Glickman, manager of Akins, that a particular fighter was Carbo's, and that Palermo should not worry about the subject. [43 R.T. 6524-6525.]

Only two days later, on March 21, 1958, at the Hampshire House in New York City, Carbo and Palermo were together with the same Bernard Glickman on the occasion of the Logart-Akins fight which Akins won, thereby enabling him to fight Martinez for the title 2½ months later. [40 R.T. 6073-6074; 18 R.T. 2630.]

Four days later, on March 25, 1958, Jack Leonard was in Chicago for the Basilio-Robinson fight. James D. Norris (of the Norris-Wirtz interests referred to above) told Leonard that Carbo wanted to see him. Leonard asked Gibson where Carbo was and Gibson told

him he would find out and that Leonard would get a telephone call. Shortly thereafter Leonard received a call from Al Weill who escorted Leonard to the Palmer House Hotel where Leonard testified, "They held trial for me more or less." The "trial" took place because Leonard, in Carbo's judgment, was not giving Weill's fighters enough activity on the West Coast. [12 R.T. 1669-1673.] Weill is described by unindicted co-conspirator Daly as a Carbo associate "who pays off like a . . . slot machine." [Exs. 100-102, 176, 101-A for Ident. at pp. 14-16.]

In April of 1958, Carbo telephoned Gibson and congratulated him upon his election as President of I.B.C. [30 R.T. 4517.]

It was during the summer of 1958 that Gibson attempted to extend I.B.C. influence to the West Coast. In August, Gibson and George Parnassus, co-promoter with Cal and Aileen Eaton, and matchmaker at the Olympic Auditorium, met at the Hollywood Roosevelt Hotel in Los Angeles. [27 R.T. 3971.] Their discussions concerned leasing of the Hollywood Legion Stadium from Hollywood Post 43 of the American Legion which was anxious to get out of the boxing business. The Hollywood Legion Stadium and the Olympic Auditorium were the only two exhibition halls for the staging of boxing contests in Los Angeles. Control of both would eliminate any competitive element in boxing in Los Angeles. [22 R.T. 3155, 3164; 23 R.T. 3307-3308; 27 R.T. 3974; 29 R.T. 4322; 24 R.T. 3474-3477, 3515, 3529-3537; 25 R.T. 3609-3619.]

At this time Jack Leonard was employed by Hollywood Post 43 as matchmaker at the Hollywood Legion Stadium. [5 R.T. 585.] Victim Donald Nesseth was a

salesman with the part-time occupation of managing a young welterweight named Don Jordan. Gibson, of course, was in charge of promoting weekly the two nationally televised boxing shows, one on Wednesday night over the A.B.C. network, and the other on Friday night over the N.B.C. network. It was costly for the sponsors to produce these shows; at least \$180,000 per week was received by the I.B.C. in connection with these promotions. [29 R.T. 4306-4309.]

Prior to September 30, 1958, and after the meeting at the Hollywood Roosevelt Hotel in Los Angeles, Gibson and Parnassus were in Portland, Oregon, at which time they telephoned unindicted co-conspirator William Daly. [29 R.T. 4322; 23 R.T. 3307-3308; 27 R.T. 3974.] The reason for the call to Daly, who was in New Jersey, was that he was friendly and influential with Edward Underwood who ran the Legion's boxing operation. It was felt that Daly could persuade Underwood to lease to the I.B.C. interests rather than to an organization known as Skiatron which was offering \$60,000 rent and intended to take over television promotion of Wednesday night fights on the A.B.C. network. [24 R.T. 3534-3536; 27 R.T. 3974; Ex. Z; 29 R.T. 4322; 22 R.T. 3158-3159, 3172, 3174-3176.] Moreover, Daly had been close to Underwood at a time when Underwood was endeavoring to terminate a strike of fight managers which was interfering with the operations of the Legion Stadium. [21 R.T. 3071-3073.] Sometime later Underwood sent an emissary to the East to talk with Carbo. This mission concerned difficulties that the Hollywood Legion Stadium was having in scheduling of boxing contests and had some relation to allegedly "unfavorable testimony in some Federal trial concerning people in the boxing game." [26 R.T.

3723-3724, line 11; 3727, line 19-3728; 3733, line 7-line 12.]

It is established that at this time unindicated co-conspirator William Daly was close to Carbo, and Daly's participation in these matters with Parnassus and Gibson makes it clear that in the event the Gibson-Parnassus plan was successful, the Los Angeles fight picture would be dominated by Gibson's I.B.C. and by Carbo. [See generally Exs. 100-102, 176, 101-A for Ident. and Reporter's Transcript citations set forth above.]

It was decided that the new boxing club, to be known as the Hollywood Boxing and Wrestling Club, would issue five shares of stock nominally to Jack Leonard. In fact, however, Leonard would pledge back the five shares as security for a loan of \$28,000 from I.B.C. and \$10,000 from George Parnassus. If and when the loans were paid off, the stock would be returned as follows: one share to appellant Truman Gibson; one share to unindicted co-conspirator William Daly; one share to James D. Norris; one share to George Parnassus; and one share to Jack Leonard. In no event was Leonard to have more than a 20% interest. Although Leonard was to be named promoter, matchmaker, and President of the Club, Parnassus was to have over-all supervision and control of the matchmaking and promotion activities of the new club. No large checks were to be drawn without Gibson's consent, and disbursement of funds in any event was removed from Leonard's jurisdiction. Leonard was a mere front in the operation of the new club. A letter dated October 28, 1958, from Truman Gibson to George Parnassus, is an apt illustration of this fact. [28 R.T. 4181-4183.]

On September 30, 1958, Gibson, Daly, Parnassus, Underwood and Leonard, met at a hotel in San Francisco. Their purpose was to procure approval of the California State Athletic Commission for the new operation. Two meetings occurred the same day: the first between the above named persons; the second meeting was with the Chief Enforcement Officer of the State Athletic Commission, Jack Urch. Daly was significantly absent. [21 R.T. 3083-3084; 28 R.T. 4139-4140; 29 R.T. 4327-4328.] Daly's interest in the new club was never disclosed to the Commission nor were the true facts concerning control of the club revealed. The impression was conveyed that Leonard was to be in active control of the Hollywood Boxing and Wrestling Club and it was on this premise that the Commission approved the new arrangement. [25 R.T. 3694-3695; 21 R.T. 3080-3082; 28 R.T. 4181-4183; 29 R.T. 4321-4322.]

As Underwood explained, this was necessary in order to obtain approval from Urch and the State Athletic Commission, in order that Gibson, or a club financed by Gibson, could take over. [25 R.T. 3619.]

The date of the first overt act alleged in the indictment is October 23, 1958, the day after the second Jordan-Ortega welterweight title elimination match. By this date the I.B.C., of which Gibson was operating head, was committed to a policy of using the underworld in the operation of its business. [34 R.T. 5050.] Gibson explained that his purpose in using the underworld to the extent that he could was "to put on fights that would please our sponsors and the public, and fights that were not fixed, in that the results were not predetermined before the fight took place." [35 R.T.

5127.] Gibson said they would use “everyone” they could to prevent fixed fights [35 R.T. 5127] and that by “everyone” he included the underworld. [35 R.T. 5130-5136.] Gibson further acknowledged when he appeared before the United States Senate that he testified that there were other reasons for his use of the underworld, to wit, “to maintain a free flow of fighters without interference, without strikes, without sudden illnesses, without sudden postponements.” [35 R.T. 5135.] At the trial he was asked about this as follows:

“Q. (By Mr. Goldstein): So that you were using the underworld in all these respects in anticipation of trouble and not because of any actual trouble, is that so? A. That is not correct. We didn’t anticipate the problems. We looked into the future to see what problems might arise and we took what we considered to be adequate steps to safeguard our business.

Q. And those adequate steps included the use of the underworld, is that so? A. Quite incidentally.” [35 R.T. 5136.]

In an effort to show that this policy was a harmless one, unconnected with the charges in this case, Gibson’s counsel, on redirect, asked the appellant whether it was “the policy of the International Boxing Club or any other organization with which you were connected in the fight business to use force or violence or threats of force and violence. . . .” To which Gibson replied: “No, indeed.” [35 R.T. 5138.]

On recross-examination of Gibson, the subject of his use of the underworld was finally concluded as follows:

“Q. Of course, Mr. Gibson, when you used various people to achieve your ends you didn’t know what those other people were doing on your behalf, did you? A. Not completely, no.” [35 R.T. 5138.]

**C. The Conspiracy Emerges: October 22, 1958—
Indictment, September 22, 1959.**

On the night of October 22, 1958, Don Jordan defeated Gaspar Ortega in a twelve round elimination bout, the winner of which was to fight welterweight champion Virgil Akins for his title. [5 R.T. 588-589.] Jordan had been managed by Donald Paul Nesseth since March, 1957. Nesseth, a used car dealer, had held a California manager’s license almost continuously since 1950. [12 R.T. 1742-1743.] After a number of bouts, Jordan became a “ranked” fighter in July, 1958, that is to say, he was listed by either Ring Magazine or the National Boxing Association as one of the top ten welterweight boxers of the world. [12 R.T. 1744.]

Jack Leonard had been connected with professional boxing since 1939 in the several capacities of professional boxer, manager, assistant matchmaker, matchmaker, and promoter. From 1955 until November 1, 1958, Leonard was the boxing matchmaker at the Hollywood Legion Stadium. [5 R.T. 585-586.] Under the agreement negotiated in San Francisco the previous month, Leonard became the “President” of the Hollywood Boxing and Wrestling Club. The Club obtained a lease to the Hollywood Legion Stadium financed by \$28,000 provided by Gibson’s I.B.C. [5 R.T. 612-615; 25 R.T. 3622.]

In the months preceding the Jordan-Ortega fight, Nesseth had been making repeated efforts to obtain fights for Jordan on national television, since televised bouts were virtually the only route to boxing prominence. These efforts included daily visits to Leonard's office at the Legion Stadium where he would prevail upon Leonard to try to arrange televised fights for Jordan. [12 R.T. 1746-1749.] Acting as an intermediary between Gibson and Nesseth, Leonard arranged a nationally televised bout at the Legion Stadium in July, 1958, between Jordan and Isaac Logart, then ranked as the number one contender for the welterweight title. The International Boxing Club co-promoted the fight with Hollywood Post 43. Jordan won the fight and rose on the rank list to the number six contender for the title. Jordan next defeated Lahouri Godih in a televised match at Madison Square Garden. [12 R.T. 1747-1752.] Jordan's victory over Logart advanced Gaspar Ortega to the position of number one welterweight contender. In September of 1958, Jordan fought and defeated Ortega in a match televised from Portland, Oregon, and co-promoted by the I.B.C. When Nesseth was promised that the winner of a rematch between Jordan and Ortega would fight Akins for the title, he agreed to the fight. [see Section B, above, for discussion of Glickman's promise to Gibson concerning defense of Akins' title on December 5, 1958.] Jordan won the bout on October 22, 1958, and became the number one contender. This match was promoted by George Parnassus and the Olympic Auditorium of Los Angeles. [12 R.T. 1752-1756.]

Prior to the Jordan-Ortega rematch on October 22, Gibson had assured Nesseth that Akins had signed a

contract to defend his title against the winner of that bout. [12 R.T. 1756; 30 R.T. 4454, 4472.] However, the contract filed with the California State Athletic Commission reflects that Akins did not sign the contract until October 28, 1958, six days after the Jordan-Ortega rematch. [28 R.T. 3771-3772; Exs. Z-29, G.]

On the morning of October 23, 1958, Nesseth went to the Olympic Auditorium to confer with Gibson about the impending championship fight between Jordan and Akins and to receive his payment from George Parnassus for the second Jordan-Ortega fight. Leonard and Warren Wayland Spaw were also present in Parnassus' office. [5 R.T. 592, 594-598; 12 R.T. 1756-1757; 14 R.T. 2057-2058.] Spaw, known professionally as Jackie McCoy, was assistant matchmaker at the Hollywood Legion Stadium and a former partner of Nesseth in a used car business. On becoming Leonard's assistant, McCoy had released his boxing management contracts with several boxers to Nesseth with the understanding that he could become a partner with Nesseth in their management if he desired to do so in the future. [14 R.T. 2055-2058.]

Leonard had come to Parnassus' office with Nesseth at the telephonic request of Gibson to discuss the Jordan-Akins fight. [5 R.T. 592, 594-598; Ex. 86-E.] Leonard requested Gibson to give the promotion of the Jordan-Akins bout on December 5, 1958, to the Hollywood Boxing and Wrestling Club, but Gibson refused, replying that Parnassus' Olympic Auditorium would promote the televised fight and if profits resulted, part would go to the Legion Club. [5 R.T. 598-599.]

Leonard had made numerous efforts to arrange televised fights for Jordan. He had no management in-

terest in Jordan but was a very close friend of Nesseth. [5 R.T. 621-622.]

Before leaving his suite at the Ambassador Hotel that morning, and after telephoning Leonard at his home in Northridge, Gibson had made a one minute telephone call to his office in Chicago at the Chicago Stadium followed by a six minute call to Palermo at the Bismarck Hotel in Chicago. [5 R.T. 592; 30 R.T. 4456-4461; Exs. 86-D, 86-C.] Gibson told Parnassus that he had spoken to Glickman the preceding night and he anticipated some problems, but that the plans for the title fight should proceed. [30 R.T. 4454.] While Gibson, Nesseth, and Leonard were discussing the December 5th fight in Parnassus' office, the telephone rang and Gibson was called to the telephone by someone in the office. Gibson spoke briefly with the party on the line and then turned to Leonard and told him that "Blinky" wanted to speak with him. Leonard picked up the receiver. The caller was appellant Palermo. [5 R.T. 599-600; 30 R.T. 4455-4456.]

Leonard testified to this first extortive demand as follows:

"I took the phone and said, 'Hello.'

He said, 'Hello, Jackie?'

I said, 'Yes.'

He said, 'Do you know we are in for half?'

I said, 'Half of what?' I said, 'I don't know what you are talking about.'

He said, 'We are in for half the fighter or there won't be any fight.'

I said, 'This is the first I have heard of it. I don't know what you are talking about.'

He said, 'Didn't Truman explain everything to you?'

I said, 'No. This is the first time I ever heard anything about it.'

He said, 'Well, there won't be any fight unless we are in for half.' He said, 'You better talk to Mr. Gibson and get back to me.'

I said, 'That is what I will have to do. I don't know anything about it. This is the first time I heard of it.'

And he says, 'Well, I am at the Bismarck Hotel in Chicago.' And he says, 'You go talk to Truman and call me back,' and with that he hung up." [5 R.T. 601-602.]

Palermo also told Leonard that he had told Gibson the day before in Chicago that " 'there was no fight unless they O.K.'d the terms out there that we get half.' " [6 R.T. 840.] Palermo later admitted he had made this statement to Gibson in Chicago prior to calling Leonard. [Exs. 97, 96-A for Ident. at p. 53.]

Leonard testified that the following ensued after he hung up the receiver:

"Well, I got hold of Mr. Gibson and Don Nesseth and we went into the hallway just outside of Mr. Parnassus' office, and I told him what Mr. Palermo had told me, and right away Mr. Nesseth said, 'There won't be any of that.'

And Truman said, 'Well, gee, I am sorry.' He said, 'I should have told you, but' he said, 'I had so many things on my mind, pressing my mind, I forgot to.' He said, 'We better not discuss this here.' He said 'I don't want George Parnassus to

know about it.' He said, 'Meet me at the Ambassador in a few minutes and we will go on further with the discussion.'” [5 R.T. 602; 12 R.T. 1757-1758.]

That afternoon Leonard, Nesseth and McCoy met Gibson at his Ambassador Hotel bungalow suite to discuss the telephonic demand by Palermo. McCoy was present for a part of the discussion. Nesseth and Leonard informed Gibson that Nesseth was not going to give away part of his management interest in Jordan's contract after Nesseth had worked so hard to obtain a title fight for Jordan. [5 R.T. 603; 12 R.T. 1760.]

Gibson told them he had learned in Chicago that Carbo and Palermo controlled Akins. [5 R.T. 629; Exs. 97, 96-A for Ident. at pp. 53, 56.] Then he said:

“... ‘You know how Carbo and Blinky are. . . . They want all of everything before you can get a welterweight title fight. . . . You should go along with this thing and I will straighten it out when I get back to Chicago. . . . I am going back tomorrow and straighten this thing out.’” [5 R.T. 603; 12 R.T. 1760; 14 R.T. 2061-2062.]

Gibson told Nesseth that he had better tell Carbo and Palermo that he agreed to their terms, pending Gibson's return to Chicago where he would “straighten everything out”, because it was very important to him (Gibson) that this title fight take place on December 5th. [32 R.T. 4780-4781.] The Christmas sales campaign for the television sponsor, Gillette, depended upon the televising of that fight on schedule. Gibson also pointed out that this was the only way Jordan

would get a title fight. Both Nesseth and Leonard replied to Gibson that it would be dangerous for them to inform Carbo and Palermo that Nesseth accepted their demand to give up half of the management interest in Jordan as a condition of the title fight being held, when, in fact, *Nesseth did not intend to give up that interest to them.* They received this answer:

“Truman says, ‘They wouldn’t resort to violence or anything like that, so severe.’ Besides he would take care of that, that that kind of stuff went out with highbutton-shoes. Truman said, ‘well, go along with it.’ He said, ‘It has been done before. That is the way the welterweight and lightweight title has been worked since Carbo and Blinky got into the picture.’” [5 R.T. 604; 12 R.T. 1761; 14 R.T. 2061-2062.]

Nesseth said that he would rather call the fight off than give in to their demand. Leonard told Gibson two or three times that he did not want to call Palermo. [5 R.T. 604.] Nesseth described the conclusion of the meeting with Gibson in the following manner:

“And Truman prevailed upon Leonard, finally, to go ahead and tell them [Carbo and Palermo] ‘Yes,” [Punctuation sic] and when I get in Chicago I will straighten everything out so there won’t be any problems,’ and he said, ‘It won’t cost you any money, I will take care of that and there won’t be any problems at all.’

“So we reminded Truman that these weren’t kids that we were talking to, and that he couldn’t do very much protecting from 2,500 miles away, if they decided to start playing rough, and Tru-

man scoffed at that and said that went out with high-buttoned shoes, that there wouldn't be any of that, and not to worry, that he would straighten it out." [12 R.T. 1760-1761; 30 R.T. 4473-4476.]

Gibson acknowledged, on cross-examination, that Leonard expressed a fear of violence during this discussion in connection with the commitment to Palermo. [33 R.T. 4849; 34 R.T. 4972.] He also admitted that he insisted that Nesseth sign a contract with a return match clause—not in favor of the I.B.C., the corporation whose interests he represented, "but sign a return match directly with the Akins people." [34 R.T. 4975.]

When Nesseth refused Gibson's request to call Palermo and indicate that the demand for a share of Jordan's contract had been accepted, Gibson persuaded Leonard to make the call from a public telephone in the lobby of the Ambassador Hotel. While Nesseth and McCoy waited outside the booth, Leonard made a brief call to the Bismarck Hotel in Chicago where he was connected with Palermo. Palermo obtained the number of Leonard's public telephone and told him he would call him back in a few minutes from a "pay phone". [12 R.T. 1762-1763; 14 R.T. 2062; 5 R.T. 605; Exs. 2, 3, 4, 72; 4 R.T. 421-429.]

In a few minutes the public telephone rang and Leonard had the following conversation with Palermo:

"I talked to him there, and I told him that I thought things would be all right. He says, 'What the hell do you mean, think?' He says, 'You either know whether they are all right, you can handle the situation or you can't handle it.' He said, 'Truman told us before he left Chicago that

everything was all right, that he had already talked to you out there.'

I told him this was the first we had heard about it, I thought everything would be all right.

He said, 'I don't want no thinks. . Can you handle it or can you not? Otherwise there won't be any fight, we are going to pull the fight out.'

I told him, 'Truman told us there is a contract.'

Blinky, said, 'There is no contract on the fight. I told him that before he left Chicago for Los Angeles, there is no contract.' There would be no fight unless we could handle the situation the way he wanted it, by giving up half the fighter.

I said, 'All right then, you have got a deal.'

He said, 'All right then, you have got a fight.' "

[5 R.T. 605-606.]

In the parlance of professional boxing, "half of the fighter" means fifty per cent of the manager's share of the fighter's purse; the manager's share of the purse customarily is one-third. [5 R.T. 607.]

Between October 23 and December 5, 1958, Leonard received several telephone calls from Palermo. Palermo demanded assurance that Nesseseth, Jordan's manager, was under control. During this same period Leonard spoke by telephone with Gibson about the plot:

"Well, I told him several times that I was worried about what was going to happen if Jordan did win the title, and he said, 'Don't worry about it,' that he would arrange everything, and kept assuring me everything was all right, not to worry.

Q. What were you worried about? A. I knew

that Mr. Nesseth wasn't going to go along with this situation. He had told me and he had told Truman Gibson that he wouldn't go along with it.

I was just wondering what was going to happen on the night of the fight if Jordan did win the title, what would happen when these people didn't receive their money or didn't receive anything at all from him.

But Truman assured me and kept assuring me if there was any finances involved, if there was any money to be involved, he would take care of it, he would pay it." [5 R.T. 617-618.]

Nesseth had Leonard tell Gibson before the December 5th title fight that they were going to tell Palermo that Nesseth did not intend to give up half of his management contract with Don Jordan:

"... Truman told him, 'Whatever you do, don't make that phone call.' He said, 'I will straighten it out here, but above all, don't tell those people that.'" [13 R.T. 1783.]

When Gibson returned to Chicago, he was visited by Akins' manager of record, Glickman, and Palermo. Glickman threatened to cancel the fight for which he had signed a contract unless Gibson guaranteed him \$40,000 rather than the 40% of the receipts stipulated in the contract. Palermo then joined the dispute and attempted to persuade Gibson by informing him that he (Palermo) now had a part of Jordan's contract. [33 R.T. 4839-4844, 4846.] Notwithstanding this knowledge, Gibson maintained on cross-examination that Palermo was not the manager of either Akins or Jordan. [33 R.T. 4900.]

Prior to this meeting, Palermo had telephoned Gibson and mentioned his share of Jordan's contract. Gibson was cross-examined on his attitude toward Palermo's conduct with respect to Leonard:

“Q. Now, when Mr. Palermo telephoned you in Chicago to tell you that he had a share of the contract, didn't you realize that there was some connection between what Mr. Leonard was telling you at your hotel and this conversation that you were then having with Palermo? A. Obviously there was a connection.

Q. Were you indignant, Mr. Gibson? A. I wasn't indignant. I had no interest in the boxer's—in the manager's contract.

Q. Well, what had Mr. Palermo done, so far as you knew, to earn a share or a part of Mr. Jordan's contract? A. I neither knew nor cared, Mr. Goldstein.

Q. You didn't care, did you? A. No, I did not.” [33 R.T. 4851-4852.]

As a result of Glickman's threat to renege on his forty per cent of gross contract, I.B.C. paid Glickman \$13,000 in excess of the Akins contract filed with the California State Athletic Commission. [33 R.T. 4857.]

On December 5, 1958, Don Jordan fought Virgil Akins at the Olympic Auditorium, Los Angeles, in a match co-promoted by the Auditorium and the I.B.C. and broadcast on nation-wide television. Jordan defeated Akins and became the welterweight champion of the world. [5 R.T. 618; 13 R.T. 1783-1784.] At the conclusion of the fight, Gibson commented to Leonard on Jordan's victory as follows:

“[W]ell, we really got our necks in trouble now. But, he says, ‘at least he has to do it twice.’”
[5 R.T. 619.]

Leonard explained that Gibson was referring to the rematch clause in Jordan’s contract with Akins which would require him to defend his newly acquired title in a second bout with Akins. Gibson told Leonard that Carbo’s and Palermo’s share of Jordan’s purse would not be due until he won the rematch. [5 R.T. 619, 628.]

About a week after the first Jordan-Akins fight, Palermo began a campaign to induce Leonard to fly to Miami, Florida, for the ostensible purpose of meeting with James D. Norris, one of the principal stockholders in the I.B.C. Palermo told Leonard that Norris would be able to help Leonard by arranging for a fight at the Legion Stadium between Jordan and Art Aragon, if Leonard could assure them that he had Jordan under control. Palermo also attempted to arrange a meeting in Tijuana, Mexico, or Miami, Florida, with Nesseth to discuss Jordan’s future. [5 R.T. 622; 13 R.T. 1784-1785; 6 R.T. 846-847.]

Leonard attempted to stall Palermo but, in Leonard’s words:

“[H]e said, well, for my own good I should make a trip back there and see what I could about making the Aragon fight—or some money fight.

I told him I would have to call Mr. Gibson, as I owed him a debt of gratitude for the money he had given me, loaned me, and Blinky said not to let him know about it, that that is why he wanted me to come back there, was to meet the people he

worked for and not to tell Mr. Truman Gibson I was coming to Miami if I did make the trip.” [5 R.T. 623.]

During this same period Leonard was contacted by Daly who commiserated with him over his financial problems in running the Legion Stadium and told Leonard that he would contact “some people and see what he could do” about Leonard’s problems. Daly also told Leonard that he would have some money for him for Christmas. Several days before Christmas, Palermo telephoned Leonard and told him that he had spoken with Daly who had stated that the money was being sent to Leonard. [5 R.T. 623-624.]

On December 23, 1958, a \$1,000 Western Union money order was purchased in Philadelphia, Pennsylvania, payable to Jack Leonard. The application indicated that the purchasing party was “William Daley”. [Ex. 82—note misspelling.] The day after Leonard received this check in Los Angeles, Palermo called him again to insist that he come to Miami to tell Norris that Gibson and Parnassus were keeping profitable matches from the Legion Stadium. Palermo assured Leonard that Norris would help him if Leonard “could assure the right people back there that [he] could control the welterweight champion.” [5 R.T. 624, Ex. 59.]

Several more calls followed between Christmas and New Year’s Day. Leonard parried Palermo with the excuse that he could not get a flight to Miami during the holiday period. Finally, Palermo called Leonard and told him that T.W.A. had space available on January 4 and 5, 1959. Leonard replied that he could not afford the expense of the trip. Palermo responded that

Leonard had one-thousand dollars. When Leonard asked him how he knew about the thousand dollars, Palermo replied that he had sent it. [5 R.T. 625.] Palermo resided in Philadelphia, Pennsylvania; Daly was a resident of Englewood, New Jersey. [39 R.T. 5848; 21 R.T. 3062; Ex. 52.]

On January 5, 1959, Leonard flew to Miami where he was met at the airport very late at night by Palermo and one Abe Sands who was identified to Leonard only as "Mike". [5 R.T. 630, 635; 18 R.T. 2629; Ex. 50. See Section B, above, for reference to Carbo's messenger who picked up \$10,000 from Akins' manager, Glickman.] They drove him about 25 miles to the Blue Mist Motel where Palermo and Leonard occupied adjoining rooms. Palermo had already registered; thus, Leonard was not asked to sign the register. [5 R.T. 636-637.] Palermo had registered that afternoon for two rooms as *George Tobias, 1620 Wood Street, Carbondale, Pennsylvania*. [17 R.T. 2558-2564; Exs. 107-A, 107-B, 107-C.]

After arriving at the Blue Mist Motel, Leonard asked Palermo if Norris was in town. Palermo replied that Leonard had just missed Norris because Norris had to leave in connection with some race horses; however, Norris would probably return the next day. Leonard retired for the night on Palermo's statement that they would arise early in the morning and try to see Norris and "some people". [5 R.T. 637.]

When Leonard awoke the following morning, Palermo informed him that they would have to move out of the Blue Mist Motel, because he had had an argument with the management on the preceding evening. They packed

their bags and moved into a neighboring motel, the Chateau Resort Motel. Each registered separately for their adjoining rooms. Leonard registered as "Jack Leonard" and gave his office address in Hollywood, California. [5 R.T. 638-639; 17 R.T. 2567; Exs. 109-A, 109-B.] Palermo registered as *Lou Gross, 1620 Wood Street, Lehigh County, Pennsylvania*. [17 R.T. 2567-2568; Exs. 108-A, 108-B.]

During breakfast, Abe Sands (Mike) escorted Carbo into the motel coffee shop. Sands commented that he had been driving most of the night. Carbo admonished Leonard for not arriving sooner:

"'If you had been here yesterday you would have seen the whole mob out at Mr. Norris.'" . . .
'Now, you missed him. He won't be here today. He had some business to attend to. But, . . . I will have to handle it.'" [5 R.T. 638-639.]

Back in the room, Carbo did most of the talking. He wanted to know if Leonard could control Nesseth and Jordan. Carbo became volatile when Leonard express doubt and said, "Can you or can't you?" [5 R.T. 639-640.]

Then, for the first time, the demand of a Jordan-Sugar Hart title match was made. [See Indictment, Counts One, Four, and Five.] Leonard testified:

"Blinky interrupted to tell me that the day before he had met with Sugar Hart's manager and he had made a deal to take over Sugar Hart, and he now had a listing and he had Sugar Hart and that we were going to have to arrange a fight with Sugar Hart and Don Jordan. [The preceding week

Hart had won a match in Miami against Ralph Dupas to become number one welterweight contender. 31 R.T. 4629.]

I told him then I didn't think Nesseth would go for a Sugar Hart fight, that, 'He can make a lot more money fighting easier fights than Sugar Hart.'

He said, 'He has got to. The only reason I got control of Hart is by telling the manager I would get a title for him.' He said, 'What the hell is the difference?' He said, 'A fighter wins the title and Nesseth gets 15 per cent of Hart.' He said, 'That is the way it works.'

At this time I think Mr. Carbo said that he didn't care so much about the money, he didn't want the money himself, that he wanted to see that Blinky Palermo got the money, because that would keep him out of his pocket. He said, 'As long as these fellows are making money I don't have to be doling out money to them.' He said he would be interested if it was a lot of money, but that kind of money Blinky and his fellows could handle." [5 R.T. 640.]

Chris Dundee, a Miami promoter and defense witness, and Gabe Genovese, a former manager, entered the suite. Carbo and Dundee retired to the other room, leaving Genovese with Palermo and Leonard:

"Mr. Genovese said he was glad I got into the family and got acquainted with Carbo, and he was telling me what a great guy he was. That now I should make a lot of money and everybody should make a lot of money, because he could get me the

big-name fighters, and he told Gibson to give me some good television fights, and we all would make some money.” [5 R.T. 641; 22 R.T. 3190.]

Genovese questioned Leonard for his estimate of the profits which Parnassus should have realized from promoting the Basilio-Aragon fight in Los Angeles. When Leonard estimated \$70,000 or \$80,000, Genovese exploded:

“[H]e said he was going to get on George Parnassus because he only received \$10,000.00 for allowing Basilio to fight; that he and Carbo only got \$10,000.00.” [5 R.T. 641.]

Carbo then re-entered the room and Genovese reported Parnassus’ deception to him. Carbo’s response:

“. . . Carbo shouted a few vulgar words and said that Greek would never get another fighter unless he guaranteed him a tremendous amount of money, he was going to make him put up a hundred thousand dollar deposit if he wanted to book Basilio or a top rank fighter again. He said he had told Genovese before not to deal with the Greek but that he had went ahead and dealt with him anyhow, so he said, ‘It’s good enough for him.’ ” [5 R.T. 642.]

Then, Dundee and Genovese departed. Carbo told Leonard that if he would control Jordan, he (Carbo) would see to it that the I.B.C. would give Leonard “a lot of good television fights and big named fighters.” [5 R.T. 642.]

When Leonard asked permission to leave the motel to take a walk, Carbo ordered him not to leave the

room. At no time while Leonard was in Miami did the defendants leave him alone. Before leaving the motel, Carbo and Palermo repeated their previous demands in an abusive manner. [5 R.T. 642-643.]

Before returning to the Miami Airport for his flight to Los Angeles that night, Palermo and Sands drove Leonard to Joe Sonken's Gold Coast Restaurant and Cocktail Lounge for dinner. [5 R.T. 644; 6 R.T. 726; Ex. 59.] During the meal, Palermo left the table and met Carbo in a corner of the restaurant where they appeared to exchange money. On the way to the airport, Palermo made a stop at an apartment a short distance from the restaurant where Leonard saw Carbo and an unidentified woman. [5 R.T. 644-645; Ex. 51.] After conferring privately in the bedroom for a few minutes, Carbo and Palermo rejoined Leonard in the front room. Leonard testified:

"The only thing Carbo said to me was that, 'Are you sure you can handle everything all right now?' I said, 'I'll try.'

He said, 'God damn it, don't try, you are going to do it, aren't you? You are the man we are looking for and you are the man responsible out there.' He said, 'This is your baby and you are the one that is going to handle the thing.'" [5 R.T. 645-646.]

Carmen Basilio, former welterweight champion, and his co-manager, John DeJohn, had a similar experience in Miami that same month. DeJohn received a call to visit James Norris, was picked up by a driver named "Sandy or Smokey", [note Leonard was chauffeured by Abe Sands], and delivered into the presence, not of

Norris, but of Frank Carbo. Basilio also saw Palermo in Miami at about this time. [44 R.T. 6574-6576; 20 R.T. 2833-2837.]

Within a few days after Leonard's return to Los Angeles, he received telephone calls from Palermo and Carbo, checking on whether he had Nesseth under control. Carbo again assured Leonard that if Leonard kept Nesseth under control, Norris had confirmed that I.B.C. would give Leonard considerable assistance. [5 R.T. 647.]

Leonard's reactions after the Miami conference with Carbo and Palermo were described by him as follows:

"A. Well, I left there with a couple of reactions. I was scared when I found out how powerful they were, and they told me as long as I went along with them, I was in business and would be in business, and if I didn't I would be out of business.

Q. What were you scared of? A. Two ways. The way they talked physically and the other way, they would put me out of business if I didn't go along with them." [5 R.T. 671.]

A non-title, non-televised fight between Don Jordan and Alvaro Gutierrez was scheduled for January 22, 1959, at the Olympic Auditorium, between the first and second Jordan-Akins title bouts. [13 R.T. 1788-1789.] Prior to that fight, Leonard was contacted by Gibson and Palermo three or four times during January, 1959. Leonard asked Gibson who was going to pay the money expected by Carbo and Palermo out of Jordan's purse from that fight. Leonard testified:

“He said, ‘Don’t worry about it, I told you we will straighten it out. If nothing else, if there is any money involved,’ he says, ‘Nesseth won’t have to pay a penny of it,’ he would take care of it.

In the meantime I heard from Blinky two or three times, wanting to know if everything was all right, and Truman told me to keep telling him everything was all right, so I kept telling him everything was all right. And it was sometime prior to the fight, sometime around the 16th or 17th of January that Blinky told me where to send the money to, Philadelphia. . . .

* * * * *

“He told me to send it to a woman by the name of Clare Cori and he gave me her address in Philadelphia and I wrote it down.” [5 R.T. 648-649; Ex. 52.]

During the trial, Palermo admitted that Clare Cori was his wife. [39 R.T. 5827.]

Gibson evidenced his peculiar interest in the Akins group by intervening at Parnausus’ request to obtain a release for Jordan from his obligation not to have any fights before the Akins rematch. This was not a televised fight. In order to obtain Glickman’s consent to Jordan’s fighting Gutierrez, the I.B.C. had to pay him \$2,500 to which Gibson did not believe Glickman was entitled. Gibson further admitted discussing a proposed Jordan-Gutierrez fight with Palermo during December, 1958. [33 R.T. 4865-4878.]

Jordan won by a knockout on January 22, 1959. His purse was \$12,500 plus expenses. [5 R.T. 649; 13 R.T. 1792.] Palermo began calling Leonard after the

fight to find out when the money was going to get to Philadelphia. Gibson assured Leonard by telephone that he would get a check out to Leonard in Los Angeles to satisfy Palermo's demands. On January 27, 1959, Leonard, Nesseth, and McCoy met Gibson again at his suite in the Ambassador Hotel in Los Angeles to discuss the Jordan-Akins rematch. [5 R.T. 650; 13 R.T. 1793; 14 R.T. 2063.]

Leonard, Nesseth, and McCoy all recalled an incoming telephone call while they were in Gibson's suite. Gibson told them that the call was from Palermo for either Leonard or Nesseth. Gibson told his visitors that he had told Palermo that they were not there because he did not want them to talk to Palermo from his room. [5 R.T. 650-651; 13 R.T. 1794-1795; 14 R.T. 2065.]

When Leonard and Nesseth left Gibson's suite, they went to Leonard's home where Leonard's wife gave him a message. He was to call "Frank" at the "Palermo Hotel back east." Previously, Palermo had given Leonard two telephone numbers to call in the Philadelphia area: HILLtop 9-1585 and FULTon 9-2664. [5 R.T. 651, 654-655; 39 R.T. 5890; Ex. 52.] Telephone records reflect that the FULTon number and its successor, FULTon 9-6441 were installed under the name of Felix Corey at 1350 S. Grove, Philadelphia, Pennsylvania. [4 R.T. 468-469; Ex. 19.] Felix Corey was the father of Clare Cori. [39 R.T. 5884-5886.] The HILLtop number was installed under the name of Mrs. Margaret Dougherty at 211 South Lynn Boulevard, Highland Park, Pennsylvania. [4 R.T. 487-488; Ex. 28.] Palermo had instructed Leonard to call him person-to-person as "Mr. Badone" or "Mr. Tobias"; other-

wise to call station-to-station. [5 R.T. 678-680; note Palermo's registration in Miami, above, and in Beverly Hills, below, as "George Tobias": Exs. 107-A, 84-A, 85-A, 34.]

Leonard went to a public telephone booth in Hollywood accompanied by Nesseth and placed a prepaid call station-to-station to the Fulton number in Philadelphia. The call was connected at 5:23 p. m. P.S.T. and lasted 5 minutes and 53 seconds. [5 R.T. 656; 13 R.T. 1796; Ex. 13.]

Palermo answered the telephone and an extortive conversation [See Indictment: Counts One, Two, Three, Six and Seven] ensued as follows:

Palermo was angry because he had not received what he considered to be his share of the Jordan-Gutierrez purse. He screamed and hollered at Leonard, claiming he was double-crossed and that Leonard was stalling him. Leonard tried to pacify Palermo by telling him that he had seen Gibson that day and the money would be sent. Palermo responded that he didn't "want to hear anything about Gibson." Leonard testified: "He [Palermo] was holding us responsible, and he wanted that money right away." Leonard heard a voice in the background say, "Give me that phone," at which point, an angry, shouting, Frankie Carbo took the telephone from Palermo:

"He said, 'You son-of-a-bitching double-crosser.' He said, 'You are no good,' and he says, 'Your word is no good. Nothing is no good about you.' He said, 'Just because you are 2,000 miles away, that is no sign I can't have you taken care of.'

He said, 'I have got plenty of friends out there to take care of punks like you.' He said, 'The money had better be in.' ” [5 R.T. 658.]

Leonard then recited the first threat that Carbo intended to use West Coast connections to obtain his ends:

“I was trying to get a word in edgewise, to tell him the money would be sent that day. He wouldn't let me say anything, he was just cursing and hollering at me and *saying there would be somebody out here to take care of me, and if that money wasn't there right away somebody would be looking me up.*” [5 R.T. 658. Emphasis supplied. See Indictment, Count One, paragraph 3c and Count Five, paragraph 3c.]

Leonard explained that Carbo and Palermo told him in no uncertain terms that he was expected to handle Nesseth and that he was badly frightened by the conversation. After hanging up, he turned to Nesseth who had been standing next to the telephone booth, and told him everything that had been said. [5 R.T. 657-659.]

Nesseth recalled that they did not have sufficient money for the overtime telephone charges and that he obtained ten or twelve additional quarters. [13 R.T. 1796.] Corroborating this is the fact that the toll slip recording this call reflects that the calling party deposited eighteen quarters, three dimes, and two nickels. [Ex. 13.]

Nesseth testified that Leonard reported the conversation to him as he left the telephone booth as follows:

“[T]he substance was that if these people didn’t get the money that they felt they had coming from the Jordan-Gutierrez fight, they were going to take it out of Leonard’s hide. This wasn’t actually all that was said, but that was the substance of it.”
[13 R.T. 1798.]

Leonard’s appearance upon leaving the telephone booth was characterized by Nesseth as “shaken up, nervous.” [13 R.T. 1798-1799.]

On January 28 or 29, 1959, Leonard contacted Gibson in Chicago and told him about the threatening telephone call from Carbo and Palermo and his fears in connection therewith. Gibson told Leonard not to worry, that he was sending the money out to Leonard right away. [5 R.T. 660.] On February 6, 1959, Leonard telephoned Gibson at the office of the I.B.C. in New York City. Gibson told Leonard to send the money demanded and he would reimburse Leonard for his outlay. [Ex. 4.] Leonard informed Gibson that 15 per cent of Jordan’s purse amounted to \$1,800, and that he did not have the money. Gibson told him to withdraw the money from the Club account in order to make the payment and promised to reimburse the Club. Leonard pointed out that the Club bookkeeper, James Ogilvie, had instructions from Gibson not to give Leonard money without Gibson’s approval. [15 R.T. 2142-2143.] Gibson replied that he would call Ogilvie and authorize him to give Leonard the money. [5 R.T. 660-661.]

On or about February 12, 1959, Gibson telephoned James Ogilvie, Secretary-Treasurer of the Hollywood Boxing and Wrestling Club, who at the time of the

trial was a property manager in the Trust Department of the Citizens National Bank. [15 R.T. 2138-2139.] Ogilvie testified that Gibson told him that “as a favor” to an unidentified friend, Ogilvie should draw an \$1,800 check on the Club to the order of “cash” and give it to Leonard who would reimburse the Club. “He stated I believe that he had to pay a friend that needed the \$1,800.” [15 R. T. 2140-2141.]

At no time during this call, according to Ogilvie, did Gibson refer to “Porterville, California” or a “Porterville promotion”, which was the false explanation which Gibson placed in the I.B.C’s books to cover the subsequent issuance of an \$1800 Chicago Stadium check to Leonard. [15 R.T. 2141; Ex. 57.]

On February 6, 1959, Leonard had mailed his personal check in the amount of \$1,725.00 payable to “Clare Cori” [Ex. 53] to Clare Cori via registered mail [Ex. 55] return receipt requested. [Ex. 54.]

Because of Leonard’s fear of Palermo and Carbo, arising out of the January 27th threatening call, Leonard back-dated his check to January 27, 1959. When Palermo called him on February 5 or 6, asking why the money had not arrived, Leonard told him that it had been mailed on the 27th of January but had been returned because his son, who mailed it, had forgotten to put postage on it. [5 R.T. 663-665.] The check was delivered to the addressee in Philadelphia on February 7, 1959. [Ex. 54.]

On February 12, 1959, after Gibson’s call authorizing the transaction, Ogilvie issued a check in the amount of \$1,800 on the Hollywood Boxing and Wrestling

Club payable to cash and indorsed by Leonard. [15 R.T. 2141, Ex. 57.]

A few days later, the Club was reimbursed for this \$1,800 check with an \$1,800 check drawn by Gibson on the Chicago Stadium Corporation bank account and payable to Jack Leonard. [15 R.T. 2141-2142; 5 R.T. 666-667; Ex. 56.] Records in the files of the Chicago Stadium Corporation pertaining to this transaction reflected that a check requisition was issued by Gibson to draw the \$1,800 check on February 10, 1959, to the payee Jack Leonard, in the amount of \$1,800.00, to be mailed to Leonard at the Hollywood Legion Stadium. Under the heading, "Remarks", the requisition described the purpose of the disbursement as: "*Advance, Promoter's share of April fight, Porterville, California*". [Emphasis supplied.] This false entry was in Gibson's handwriting. [6 R.T. 787-789; Ex. 66.] As of September 30, 1959, the account receivable in the amount of \$1,800 set up on the books of the Chicago Stadium Corporation based on this check was charged off as an uncollectible bad debt. This charge-off was done at Gibson's direction. [6 R.T. 793-794.]¹

Leonard's \$1,725 check mailed to Philadelphia and made payable to "Clare Cori" was collected by the First

¹Leonard explained that he sent Palermo only \$1,725, although 15 per cent of \$12,000 is \$1,800, because in one of Palermo's calls Leonard had complained that he had run up large telephone expenses, and Palermo told him to deduct them from the payment; Leonard deducted \$75.00. [5 R.T. 665.] Prior to the Jordan-Gutierrez fight, Palermo had told Leonard that they wanted "15 per cent off the top" rather than one-half of the manager's share of the purse. "15 per cent off the top," in professional boxing parlance means 15 per cent of the fighter's gross purse. Palermo explained to Leonard that this revised demand avoided for Carbo and Palermo the problem of padding of expenses by the manager before computing their share of the purse. [5 R.T. 665.]

National Bank, Hollywood, Florida. It bore the prior indorsements of "Clare Cori" and one Joe Sonken. Sonken was the proprietor of the restaurant to which Leonard was taken by Palermo during his brief trip to Miami on January 6, 1959. [Exs. 53, 58.]

The check had been cashed for Palermo by Sonken through a check exchange transaction in which Sonken deposited in his bank account the \$1,725 check payable to "Clare Cori" and then issued his own check payable to a fictitious person, one "Carmen Cosara." Sonken indorsed not only his own name on the check but also wrote the fictitious name "Carmen Cosara" thereon. Sonken charged Palermo a \$25 fee for cashing the check. [21 R.T. 3011-3018, 3020-3024; 17 R.T. 2570-2572; Exs. 53, 110-A, 110-B, 110-C, 124.]

Although Palermo contended at the trial that this check represented partial repayment of a loan by Leonard and did not constitute income to him, this was refuted by the rebuttal testimony of Palermo's own accountant, Irvin Sklar of Philadelphia, who had prepared Palermo's 1959 federal income tax return. Palermo had advised Sklar that he had received \$1,725 income from "Jackie Leonard" in 1959 from a "boxing promotion for services rendered". [40 R.T. 5969-5970; 44 R.T. 6307-6308, 6620-6626, 6629-6636, 6644-6645; Exs. 53, 170, 171, 172, 174.]

Palermo's acknowledgment of receipt of the \$1,725 Clare Cori check was described by Leonard:

"... Blinky Palermo called me and cursed me out and everything, screaming at me for sending a personal check. He said I should have known better than that and from now on he didn't want to never

hear of anything like that. To do it some other way, but no personal check at all.

* * * * *

He told me to send a money order or any kind of way except a personal check.” [5 R.T. 670-671.]

Carbo and Palermo apparently returned to Florida after the January 27 call from Philadelphia, because they were visited by John DeJohn and Gabe Genovese in February, 1959, at a private meeting in the Treasure Island Motel in Miami. [44 R.T. 6576-6577.]

After receiving the money for the Jordan-Gutierrez fight, Palermo assumed a more friendly demeanor toward Leonard, assuring him that Carbo would aid Leonard in his efforts to obtain nationally televised bouts from the I.B.C. for the Hollywood Legion Stadium. Palermo referred to Carbo in these calls as “The Man” or “The Gray”. [5 R.T. 671-672.]

During this same period between the payment of the \$1,725 to Palermo and the second Jordan-Akins fight on April 24, 1959, Gibson began to take a new tack on the mode of paying Carbo’s and Palermo’s share of Jordan’s future purses. Leonard described his conversations with Gibson during this period:

“In the meantime I talked to Truman a few times about trying to get some shows, also, because we were not getting any good fights at the time and were in financial difficulties all the time.

Truman assured me he was going to give me some good fights, but to try to get Don Nesseth into line a little bit, that Don was acting like a child, and that after all, he should go along with

these fellows because the promoters usually pay that money anyhow. That if it is four or five thousand dollars, they can usually get it marked off as expense money, and that it wasn't going to be anything out of his pocket." [5 R.T. 672-673.]

About two weeks before the Jordan-Akins rematch in St. Louis, Missouri, Nesseth was told by Leonard that Palermo wanted to see Nesseth in East St. Louis when Nesseth arrived in St. Louis for the fight. [13 R.T. 1803-1804.]

On April 22, 1959, two days before the title rematch, Leonard received a telephone call from Palermo. Palermo wanted to know if Leonard was coming to St. Louis for the fight. When Palermo learned that he was not, Palermo said:

"'. . . Jesus, you got to be here. You have got to help settle this thing.' He said, 'You have got to give us some money and I want him to fight Hart.'

I said, 'Well, Jesus, I told you before that I didn't know about Hart. I am almost positive that Nesseth will never fight Hart.'

He said, 'Well, he is going to have to fight him.'

I said, 'What are you doing, taking over complete possession of Jordan?'

And he said, 'In a way, yes. We want to know who he is fighting for, who he is fighting, what he is fighting, and we have got to give the O.K.' He said, 'Carbo told you that in Miami, that if you are going to work with us you have got to go all the way with us or you won't get any help at all out there.'" [5 R.T. 674-676.]

Nesseth and his party arrived in St. Louis on April 14, 1959, and stayed at the Kingsway Hotel. [13 R.T. 1804.] Leonard remained in Los Angeles. On the night of the fight, April 24, 1959, Nesseth, considered an outsider by the professionals in the “boxing game,” was standing in a room adjacent to his fighter’s dressing room when he was first confronted by Palermo. Palermo was introduced to Nesseth as “‘somebody you should know. . . .’” [13 R.T. 1805-1806.]

Fearing a confrontation with Palermo, Nesseth had met with Sergeant Edmund Moran, head of the hotel squad of the St. Louis Police Department. [13 R.T. 1806; 18 R.T. 2622, 2624-2625.] Before the fight began, Moran had observed Nesseth leave Jordan’s dressing room and walk down the hall to Akins’ dressing room. When Nesseth returned a few minutes later he spoke with Moran. Moran was asked:

“Q. And would you tell us how Mr. Nesseth looked when he came back? A. Well, he was—he was scared.” [18 R.T. 2625-2626.]

Moran then asked him what the matter was and proceeded to a vacant dressing room at the head of the stairs where he observed Palermo and two other men in conversation for about five minutes. One of the two other men was Morris Shenker, an attorney. [18 R.T. 2624-2627.] During the fight, Moran observed Palermo confer with Akins’ manager Glickman in Akins’ corner. [28 R.T. 4207.]

Jordan won the decision over Akins on April 24th and retained his world welterweight championship. The fight was promoted by Sam Muchnick of St. Louis, Missouri. Gibson’s corporation, Title Promotions, Inc.,

promoted the television aspects of the fight. [Exs. 111, 112, 115.] However, Muchnick did not make the match; it was handed to him already made. [18 R.T. 2611.] On the evening of the fight, Muchnick, too, had observed Palermo in the dressing room at the head of the stairs. He had not authorized Palermo to enter the dressing room area which was not open to the public. *To his knowledge*, Palermo had no connection with the management of either Jordan or Akins. [18 R.T. 2598-2599.]

The morning after the fight, Muchnick was visited by Palermo and Glickman. Glickman asked Muchnick for a financial statement on the fight: the gross receipts, the net receipts, and the amount the fighters were supposed to receive. Each fighter was to be paid 30 per cent of the receipts and \$15,000 from the payment for the national television rights. [18 R.T. 2601.] Muchnick had received \$55,000 for these rights from the Gillette Safety Razor Co., the television sponsor. [18 R.T. 2619-2620; Exs. 114, 115.] Muchnick testified:

“When Mr. Glickman asked me for the statement, I had the statement in front of me and I handed it to him and he looked at it. Then he tossed it back to me and said, ‘What is 15 per cent of this?’

* * * * *

[A]nd I took a pad and I figured it out and I handed it back to him.

During the course of the conversation either Mr. Palermo or Mr. Glickman mentioned something about Jordan or Nesseth owing some money and Mr. Glickman said, ‘Well, Sam can’t pay out any

money because all the purse has to go through the State Athletic Commission.'

And Mr. Palermo asked if I had heard from Mr. Leonard about some money owed him, and I said, 'No, sir, I didn't.'

* * * * *

[A]bout that time I told Mr. Palermo there had been a telephone call asking for him, and Mr. Palermo told Mr. Glickman to call his attorney, Mr. Morris Shenker, and Mr. Glickman made several calls and finally located Mr. Shenker, and when he did Mr. Palermo talked to him on the telephone, and when he was through with the conversation he turned around to Mr. Glickman and he said, 'I have got to leave. Mr. Shenker told me to leave.' And Mr. Palermo left." [18 R.T. 2601-2602.]

Included among the payments made for the account of Akins' management by Muchnick in connection with the second Jordan-Akins fight was a \$200 check drawn by Muchnick, at Glickman's request, payable to Palermo's attorney, Morris Shenker. [18 R.T. 2604, 2606-2607; Ex. 113.]

Later that morning, Nesseth visited Muchnick's office to obtain his share of Jordan's purse. [13 R.T. 1807; 18 R.T. 2607.] Later that day, as Gibson was leaving the Chase Hotel in St. Louis to return to Chicago, he met Palermo who was on his way to the Kingsway Hotel to talk to Nesseth. Gibson described his conversation with Palermo as brief and to this effect:

"He asked me if I would go over and see Nesseth with him and help him get a matter straightened out that was in confusion." [31 R.T. 4617-4618.]

Gibson testified that Palermo did not elucidate what the "matter" was. [31 R.T. 4618.] Palermo testified:

"On my way out I ran into Mr. Truman. He had a party with him. He was going to the airport, he was leaving for the airport.

So I says, 'I'm going over to see Nesseth for a minute.' I don't recall whether I asked him to go along with me or not, but I think Mr. Truman is a little mistaken, because I told him I was going over to see Nesseth." [39 R.T. 5820.]

When Palermo arrived at the Kingsway Hotel, Nesseth was in the room of his friends Don Chargin and Harvey Livingston. Chargin was a fight promoter from Oakland, California. [15 R.T. 2216.] Livingston was an automobile tire dealer from Hayward, California, and the manager of the top ranking lightweight fighter Johnny Gonsalves. [16 R.T. 2322, 2328, 2330.]

Palermo called Nesseth on the house telephone from the lobby and told him that he wanted to talk to him. Nesseth told him to come up. [13 R.T. 1808.] Muchnick received a call from Nesseth and then called Sergeant Moran at his home. [18 R.T. 2607.] Moran then telephoned Nesseth who had a cryptic conversation with him while Palermo, Chargin, and Livingston were in the room. [18 R.T. 2627-2628; 13 R.T. 1813-1817.] Moran then left for the Kingsway Hotel. [18 R.T. 2627-2628.] Palermo told Nesseth that he wanted to talk to him in private. [13 R.T. 1808-1809; 15 R.T. 2219; 16 R.T. 2325.] Nesseth testified to the conversation in the adjoining bedroom alone with Palermo as follows:

"[W]ell, the first thing he said, when he walked in he said, 'You know why I am here?'

I said, 'Yes, I know why you think you are here.'

He said, 'I want my money.'

I told him that I didn't owe him any money.

And he said, 'Well, you paid me the last time,' referring to the Gutierrez-Jordan fight, and I said, 'I have never paid you a cent and I don't intend to.'

Then I repeated everything that had happened at the Ambassador Hotel, the fact that I had never gone along with the deal and that Truman had insisted that Leonard tell him that I was going along with the deal, and the only reason I was meeting with him this time was that I didn't want to be hiding from him all the time, playing cat and mouse, that I wanted to sit down and tell the man my story of the actual truth of the matter. And I also told him that if Truman wanted to give him \$10,000 every time Jordan fought, that as long as it didn't cost me anything, I didn't care if he got the money.

So Blinky said, 'Well, we better call Truman about this.'

And I told him, I says, 'Well, Truman doesn't owe me any money and I am not going to call him.'

He then wanted me to go to Chicago with him to confront Truman, and I informed him that I wasn't going to Chicago with him, and I didn't want to go anywhere with him.

And I had to repeat this to him; we probably went back and forth over this three or four times in order for him to clearly understand it, and *he made the remark that some mighty big people were*

going to be unhappy about it and that I hadn't heard the end of it." [13 R.T. 1809-1811. Emphasis supplied.]

Nesseth told Palermo that he did not like Palermo's visit to Sam Muchnick's office to attempt to collect 15 per cent of Jordan's purse on the representation that "he had it coming." Palermo replied that "he thought he had the money coming and he went to get it." The meeting was ended by a telephone call for Nesseth in the adjoining room. [13 R.T. 1812.]

As Palermo was leaving:

"[H]e stood by the door and said, 'Well, I am going to be out to the Coast and we are going to have a meet.'

Q. A what? A. A meeting. He called it 'a meet'.

Q. A meet. A. Yes. And I said, 'Well, I told you I met you this once to explain my situation and the truth of the matter, and I don't want to meet you on the Coast or anywhere.'" [13 R.T. 1812-1813.]

Chargin recalled that Nesseth was called to the telephone while Palermo was in the bedroom and that Nesseth said to the party on the line: "'The people are here. Why don't you come over?'" [15 R.T. 2223. Apparently Nesseth's cryptic conversation with Sergeant Moran.] He also remembered that Palermo and Nesseth were talking when they finally left the bedroom on Palermo's way out:

"... Mr. Palermo asked Don Nesseth to accompany him to Los Angeles and then Nesseth replied that—to Palermo that, 'You don't understand

English very well. I told you that I was going to see you this once and not again.'

And then Mr. Palermo said that—mentioned that, '“The Man” is not going to like this.' And then he—then is when he asked Mr. Nesseth to go to Chicago to see Truman Gibson.' [15 R.T. 2225. Note Palermo's earlier reference to Carbo as “The Man” in telephone conversations with Leonard.]

Livingston also testified to his observations as Palermo was leaving the bedroom:

“Then when he came out he said something about a meeting in Chicago and Don Nesseth said that he didn't want anything to do with him, he didn't want to have no meeting with nobody.

And then Mr. Palermo said, 'Well, “The Man” isn't going to like this,' and he got up and left.” [16 R.T. 2325.]

Sergeant Moran arrived after Palermo had departed. Nesseth related Palermo's demands to Moran. [Exs. 97, 96-A for Ident. at pp. 70-71.]

After leaving Nesseth, Palermo telephoned Leonard in Hollywood. Leonard testified:

“[H]e told me, 'What the hell is going on?' He said he wanted his money, that he went to see Nesseth and Nesseth practically threw him out of his hotel room. Nesseth wouldn't talk to him at all and wouldn't have no dealings with him.

I told him, 'Well, he is the man you have to see.'

'Well,' he said, 'I will be out on the Coast to see you.'

I said, 'There is no use you coming out on the Coast to see me, you are still going to have to see Nesseth whether you are here or there.'

He said, 'I am coming out and I will see you in a few days.' " [5 R.T. 676-677.]

On Monday, April 27, 1959, Leonard received a call from Gibson:

"... Truman was upset with Don Nesseth and myself and all of us.

* * * * *

[H]e had heard that Don Nesseth had made a release or something up at St. Louis that he was going with [Cus D'Amato], who had the heavy-weight champion of the world Floyd Patterson at that time, and he was trying to form his own organization.

Truman was very upset. He said, 'Although I am upset with you, Jackie, and Nesseth, and everybody else,' he said, 'how much was the purse Jordan made Friday night?'

I told him I didn't know exactly, all I knew was what I had seen in the papers. He told me to find out exactly what it was when Nesseth got into town, because either way, he said, 'Although you guys were no good,' that he was going to have to pay these people because he had agreed to pay them, and he was going to send me a check for the money and for me to send it to them. He said the way he figured it would be somewhere between four thousand and four thousand five hundred dollars. [Note Gibson's payment of \$9,000 to Palermo on May 15, 1959, discussed below.]

I think I told him when I seen Nesseth I would have him call him or I would call him and let him know what the purse was.” [5 R.T. 677-678.]

A telephone toll slip reflects that a person-to-person telephone call was placed from the Chicago Stadium for “Leonard” at the Hollywood Legion Stadium on April 27, 1959. The call was connected at 1:43 p.m., Chicago time, and lasted 6 minutes and 8 seconds. [Ex. 45.]

The same day Palermo called Leonard again:

“... I believe it was on that same Monday that I talked to Truman, and asked me if I had seen Nesseth. I told him no, he was in Indianapolis, I believe it was, that he was back East, anyhow, and he hadn’t gotten back yet.

He told me I would be hearing from him right away, I better do something to straighten this mess out *or I was going to get into a lot of trouble with the people back East.*” [5 R.T. 678. Emphasis supplied.]

On Monday evening, April 27, 1959, the Nesseths and Chargin checked out of the Edison Hotel in New York and flew to Los Angeles, arriving there on April 28. Chargin left the Nesseths at the Los Angeles International Airport and flew to San Francisco. Nesseth went to Leonard’s office at the Hollywood Legion Stadium. [13 R.T. 1818; 17 R.T. 2531, 2547-2551, Exs. 104-A, 104-B, 105-A, 105-B.]

While Leonard and Nesseth were discussing the events of the last few days, the telephone rang and Leonard answered:

“[T]he voice said, ‘Hello, hello, hello. You know who this is?’

I says, ‘Yeah, I know who this is.’

And he says, ‘You’re a no good’—and he used some vulgar language and called me a double-crosser and *told me that he was going to get somebody to take care of me, that if he was there, he would gouge my eyes out, and I was going to get hurt, and when he meant hurt, he meant dead,* and he called me another S.B. and different names, real bad names, ‘double-crosser,’ and he says, ‘*We are going to meet at the crossroads,*’ he says, ‘*You will never get away with it.* I have had that title 25 years and no punks like you are going to take it away from me,’ and he repeated that statement, he says, ‘*When I mean get you, you are going to be dead,*’ he said, ‘*We will have somebody out there to take care of you.*’

And with that, he hung up.

Q. Who was it? A. Frankie Carbo.

Q. Was there anybody in the office when you received this call? A. Yes, sir. Don Nesseth was sitting right next to me.

Q. What was your reaction after this telephone call? A. Well, for one time in my life I was really scared. *I vomited.*” [5 R.T. 680-681. Emphasis supplied.]

Nesseth testified to what he observed while Leonard was on the telephone:

“What I heard from Leonard’s end of the conversation, there wasn’t very much conversation on his part. One or two times he stammered and said, ‘You shouldn’t say those things.’

But the call, I would say it was very one-sided, and I did notice and observe that Leonard turned about the color of your shirt during the course of that conversation, and when the phone call was over and he hung up the phone he sat there just for a second and he got up and ran across the hall to the ladies' room, which we use during the daytime as a men's room, and *he vomited*. I have never seen anybody any more shaken up than he was at that time." [13 R.T. 1819. Emphasis supplied.]

When Leonard returned to his office he related to Nesseth what Carbo had said on the telephone. Nesseth corroborated Leonard's testimony about the conversation and said that he became frightened when he heard what Carbo had said. He recalled that Leonard quoted Carbo as saying that he had "friends on the West Coast." [13 R.T. 1824-1826.]

Leonard testified to the events of the next few minutes as follows:

"Within five to ten minutes, the phone rang again and it was Blinky Palermo and I jumped on him about having Carbo call me and threaten my life, threaten me, and he says, 'Well, Jesus, he was right, wasn't he?'

He said, 'What do you think you got coming?' He said, 'You are nothing but a double-crosser.' He says, 'You had it coming. Anything he said you had coming.'

And he said, I was a double-crosser and I was no good and he was coming to the coast and *he was going to see some people and they were going*

to see me. And I told him there was no good to come, that I was mad, I was very mad, and I hung up on Blinky.” [5 R.T. 681-682, Emphasis supplied.]

Nesseth also corroborated Leonard’s testimony as to Palermo’s threatening call. [13 R.T. 1827-1828.]

Telephone toll slips produced by the Bell Telephone Co. of Pennsylvania reflect the following: on April 28, 1959, two long-distance calls were placed to Leonard’s office at the Hollywood Legion Stadium from one of the telephones regularly used by Palermo in Philadelphia. [Exs. 6, 19; 39 R.T. 5884-5886, 5890.] The first call (from Carbo), person-to-person to “Jack Leonard”, lasted 6 minutes and 36 seconds. [Ex. 21.] The second call (from Palermo), received four and one-half minutes after the first, was a 30 second station-to-station call to the Hollywood Legion Stadium. [Ex. 22. See Indictment: Counts 1, 5, 8 and 9.]

Leonard related his experiences immediately following the second telephone call on April 28, 1959:

“Well, I got sick, sick to my stomach and everything, and I went home and about several hours later when I got home, I received another call from Blinky at home. He wanted to know if I cooled off yet and said, ‘Jesus, there is no use being like that.’ He says, ‘After all, maybe the guy shouldn’t have called like that, but’ he said he figured he had a right to, ‘they have had that account a long time and you people out there are double-crossing him.’ He said, ‘Now, we might as well be like gentlemen and not be mad,’ and he says, ‘I will be out there and talk to you.’

I said, 'There is no use of coming out here, I am fed up with all of you,' and I told him he would have to see Nesseth and he said, 'I can't see Nesseth unless he will sit down and talk to me.' And I said, 'You will have to take care of that, there is nothing I can do about it. Nesseth doesn't want to talk to any of you and if you want to talk with him, you will have to make your own contact with him.'

With that he said, 'Well, I will be out there in a few days and *we are going to look you up.*'"
[5 R.T. 683. Emphasis supplied. See Indictment: Counts 5 and 10.]²

Carbo's presence in Philadelphia with Palermo was further confirmed by John DeJohn, co-manager for Carmen Basilio, who saw Carbo and Palermo together in a private residence in Philadelphia in April or May, 1959. [44 R.T. 6574-6578.]

Telephone records further reflect that one person-to-person call for Leonard followed by three station-to-station calls were made from the Chicago Stadium to the Hollywood Legion Stadium during business hours on April 29, 1959. [Exs. 40, 41, 42, 44.]

²No toll slip appears in the record reflecting a third call from Philadelphia to Leonard on April 28, 1959. However, a person-to-person call was made from the Felix Corey residence in Philadelphia to "Jack Leonard" at Leonard's home in Van Nuys, California, on the evening of April 29, 1959. [Exs. 9, 19.] The connecting time in Philadelphia was 10:58 p.m. and the call lasted 3 minutes and 54 seconds. [Ex. 20.] However, the telephone company practice in Pennsylvania is to date toll slips en masse after the other information has been filled in, and the operation of dating is performed by persons other than the operators who place the calls and record the other information on the toll slips. [4 R.T. 470-473.] See Appendix A for a chronological chart of toll slip evidence.

On the same day, Gibson received a collect person-to-person call from a party named "Frank" in Philadelphia. The call lasted 5 minutes and 6 seconds. [Ex. 39.] On occasion, Carbo and Palermo had used the name "Mr. Frank" when placing long distance telephone calls. [43 R.T. 6520; 32 R.T. 4693.]

Additional telephone toll slips reflect the following telephone activity during the evening of April 29, 1959:

At 7:20 p.m., Philadelphia time, Palermo made a collect person-to-person call from Philadelphia to Gibson at his home in Chicago. The call lasted 4 minutes and 30 seconds. [Exs. 23, 32.]

According to telephone records, at 10:58 p.m. Philadelphia time, the person-to-person call from the Felix Corey residence to Leonard's home in Van Nuys, previously referred to, was made. [Ex. 20.]

Thereafter, at 11:05 p.m., Philadelphia time, a station-to-station call was made from the Felix Corey residence in Philadelphia to Gibson's residence in Chicago. This call lasted 3 minutes and 8 seconds. [Ex. 25.]

Twenty minutes after Palermo completed this call to Gibson, a person-to-person call was made to "Jackie Leonard" at Leonard's residence in Van Nuys, California, from the residence of William Daly, the unindicted co-conspirator, in Englewood, New Jersey. The call was connected at 11:28 p.m. Englewood time, and lasted 5 minutes and 27 seconds. [Exs. 29, 31.]

At 11:55 p.m., Philadelphia time, another station-to-station call was made from the Felix Corey residence to Gibson's Chicago residence. [31 R.T. 4640, Ex. 24.]

On April 30, 1959, at 10:01 a.m., Chicago time, "Truman Gibson" made a person-to-person call to "Leonard" at Leonard's residence from the Chicago Stadium. The call lasted 6 minutes and 46 seconds. [Ex. 47.]

Thereafter, four station-to-station calls were made during business hours that day from the Chicago Stadium to the Hollywood Legion Stadium: at 11:44 a.m., lasting 4 minutes and 10 seconds [Ex. 43]; at 1:14 p.m., lasting 7 minutes and 42 seconds [Ex. 49]; at 3:51 p.m., lasting 16 minutes and 6 seconds [Ex. 48]; and at 4:09 p.m., lasting 5 minutes and 13 seconds. [Ex. 46.]

Leonard testified that during the days following the death threat calls from Carbo and Palermo, he spoke with Gibson and told him what had happened. Gibson told Leonard to call him if anybody contacted him. [5 R.T. 684.]

About April 29, 1959, the promoters at the Olympic Auditorium withdrew their \$20,000 surety bond guaranteeing the performance of the Hollywood Boxing and Wrestling Club to the California State Athletic Commission. This bond was a condition precedent to the continued existence of the club. [25 R.T. 3638.]

On April 30, 1959, Palermo checked into the Bismarck Hotel in Chicago and charged his stay to "I.B.C., address Truman Gibson, Approved by Chicago Stadium, Ben Bently, Chicago Stadium." [12 R.T. 1731-1732, 1739-1740; Exs. 70, 71.] Palermo frequently charged his stays at the Bismarck to Gibson's firm. [40 R.T. 6002.]

That same day, Gibson admitted, he was on the telephone with Leonard offering to pump additional capital into the Hollywood Boxing and Wrestling Club *if Leonard would persuade Nesselth to sign for a Jordan-Hart title match*. Gibson told Leonard that the fight would be promoted at the Legion Stadium. [31 R.T. 4631-4632. See Indictment: Count 1, paragraphs 3a and 3d.]

Gibson further admitted that he met with Marty Stein, Sugar Hart's manager of record, on May 1, 1959, at the Bismarck Hotel where Palermo was staying. Gibson had discussed matching Hart and Jordan in one of the three telephone calls from Palermo the preceding day. Gibson acknowledged that Palermo joined him and Stein in the lobby of the Bismarck Hotel after lunch and that Palermo and he (Gibson) were both trying to effect a match in which Jordan would defend his title against Hart. [31 R.T. 4641-4643.]

While Palermo was at the Bismarck that day he made three long distance telephone calls. Although the Bismarck had the original toll slips reflecting these calls when the Federal Bureau of Investigation first contacted them during the investigation of this case, and although it was the business practice of the hotel to maintain such records for three years, when the Government served a subpoena duces tecum on an employee of the hotel to produce these records, they could not be located. [12 R.T. 1732-1734.] The Bismarck Hotel is a joint enterprise of James Norris and Arthur Wirtz—Gibson's employers. [36 R.T. 5284-5287; 32 R.T. 4790-4791.] However, the F.B.I. had taken the precaution of photographing these records, and the photographs were received into evidence. [12 R.T. 1734-1735; Exs. 74, 75, 76.]

The calls, all dated May 1, 1959, were as follows: a 2 minute station-to-station call to the number from which Palermo and Carbo had made the threatening calls to Leonard in January and April [Exs. 74, 19, 13, 21, 22, 20]; a 17 minute person-to-person call to "Parnasols" (obviously George Parnassus) at the Olympic Auditorium in Los Angeles [Exs. 75, 162]; and a 3 minute station-to-station call to the Hollywood Legion Stadium. [Ex. 76.]

During the afternoon of May 1, after meeting with Gibson and Stein, Palermo flew directly to Los Angeles. His business was so urgent that he failed to check out of his hotel. [12 R.T. 1726-1729; 40 R.T. 6004; Exs. 70, 71, 73.] Arriving in Los Angeles the same day, Palermo registered at the Beverly Hilton Hotel in Beverly Hills under one of his aliases, "George Tobias". [15 R.T. 2180-2182; 39 R.T. 5857; Exs. 85-A, 85-B, 85-C.] He gave his home address as "110 N. Clark Street, Chicago, Illinois". [15 R.T. 2179; Ex. 84-A.] The building located at this address is the Cook County Building containing the various offices of county government. There are no residences in the area. [43 R.T. 6493-6494; Ex. 144.]

From this time, Carbo's "friends on the West Coast" openly joined the conspiracy.

On the evening of Friday, May 1, 1959, Palermo had a meeting with appellant Dragna at Puccini's Restaurant in Beverly Hills. [40 R.T. 6030-6037; 38 R.T. 5615-5616.] Dragna admitted that Palermo suggested that he (Dragna) contact Leonard. [38 R.T. 5618-5619.] Palermo informed Dragna that the purpose of his trip to Los Angeles concerned Sugar Hart. Dragna told Palermo to call him on Monday, May 4, and pro-

vided him with a telephone number for this purpose. [38 R.T. 5666-5667.]

On Saturday or Sunday (May 2 or 3) [6 R.T. 720; 40 R.T. 6030; 36 R.T. 4984-4988], Leonard received a telephone call from Palermo:

“... He told me he was in Los Angeles and he has got to see me right away; that he is at the Beverly Hilton Hotel; and I tell him, ‘Well, Jesus, it is late,’ it was late at night, I don’t know whether it was 10:00 or 11:00 o’clock, it was quite late and I says, ‘I have the wife and kid here.’

Well, he said, ‘Bring them with you and they can wait in the lobby.’

Well, I told my wife I better go, it’s serious.

And so we went, the three of us, and I left them downstairs in the parking lot, it was a very well lit parking lot and an attendant there, and so they stayed there and I went into the lobby of the hotel and there was Blinky Palermo *with Joe Sica.*” [5 R.T. 684; Emphasis supplied.]

Leonard had met Sica seven or eight times before but had never transacted any business with him. [5 R.T. 685.] Palermo told Leonard he and Sica wanted to talk to him in Palermo’s room upstairs. They took the elevator to the sixth or eighth floor where they sat him down and confronted him as follows:

“... And Joe says, ‘I am surprised at you. You got yourself in a hell of a jam here,’ he said, ‘with good people and doing a thing like this to them.’

And I tried to explain to him that it wasn’t my fault, it wasn’t Nesseth’s fault, it was Tru-

man Gibson's fault, and Truman Gibson had put everybody in the middle when he said he could fix everything up and that he said to go ahead and go along with it, and Joe didn't want to hear anything about Truman Gibson.

* * * * *

Joe said, 'Leave him out. We don't want to hear nothing about that Truman Gibson,' and he used a couple of vile words. And the same thing with Blinky, he told me the same thing, he said, 'I don't want to hear anything about Gibson, he has nothing to do with this.' 'You are the man we are holding responsible.' He says, 'I want to hear your story and I want to hear Blinky's'—this is Mr. Sica talking.

So I started to say something. Blinky told me to shut up, so I did. I shut up and told him 'Go ahead and tell your story.'

And he told the story about me telling Carbo that everything was all right.

* * * * *

Blinky was telling his story to Sica about my telling Carbo everything is all right and that I was going to go along with it and I told him, then, I interrupted him to try to tell him, 'Jesus, I told you that Truman was in the middle of this thing.'

So he said, 'I told you to shut up and sit down. We are not going to talk about Truman. We are talking about you and your part in this thing.'

So Joe told me he had been a friend of The Gray for many, many years, meaning Frankie Carbo, and although he knew me and knew of me and knew me, he didn't want to see me get in any

bad trouble, that I was in serious trouble and could get hurt or something could happen to me on something like this.

* * * * *

... He said that we weren't playing with kids, we were playing with grownup men, and Blinky started shouting, saying that his neck was in the noose, that he couldn't leave California until this thing was straightened out, that he was in real, real bad shape with Frankie Carbo with this mess; that he had stood good for me telling Carbo I was all right, that Truman Gibson was in the middle, because he had said that everything was all right; in other words, it looked like everybody was in the middle except Frankie Carbo.

So Blinky said, 'What the hell are we going to do to straighten this thing out? We got to do something. I can't go home like this.'

I said, 'There is nothing I can do. I just don't know what to tell you. You are going to have to talk to Nesseth.'

Joe Sica said, 'Jesus Christ, get hold of Nesseth.'

I said, 'It is late at night,' I said, 'I can't get hold of Nesseth.'

Well, he says, 'Doesn't he have a phone?'

I said, 'He has got one, but I don't even have the number. Can you see him tomorrow?'

Joe said, '*Drag him in, got out and grab him by the neck and get him out of bed and shake him and get him in line.*'

I said, 'Well, I can't do that.'

He said, 'Can't you whip him?'

I said, 'It isn't a question of whipping him.'

I don't know whether I can whip him or not but I am going on doing business with him again.'

He said, 'Well, look, Jackie, you made a choice. It is a question of either you or Don Nesseth is going to get hurt.'

He says, 'Look, Jackie, you made a choice. It is a question of either you or Don Nesseth is going to get hurt. Wouldn't you rather go grab him by the neck and straighten him out, than for me to go back and tell "The Gray"? You try it, you are all right, but it is Nesseth that is no good.'

'The way it is now,' he says, 'you and Blinky have both got your necks in a sling.' and he said, 'Something has got to be straightened out.' He said, 'If you have to, go out and beat the hell out of Nesseth. If you need any help we will go with you and help you and drag him out of bed.'

I assured him I wasn't going to do anything like that to Nesseth, that I could get hold of Nesseth in the morning and try to get him to talk to them and see what we could do in the morning.

So with that I got up and edged my way to the door, and Joe said, 'Are you going to see this guy in the morning and straighten things out?'

And Blinky said the same thing, to get it all straightened out.

And I said, 'Well, I am going to try.'

Blinky said, 'Try, hell. You are going to straighten it out. I can't go home like this. I am in a hell of a jam with "The Gray Man".'

With that I told him I would see him in the morning and I went down the elevator and left.

I left Joe and he there together.” [5 R.T. 686-692. Emphasis supplied.]

Leonard was asked if anything was said to him about a fight with Sugar Hart. He testified:

“Well, Blinky said, ‘That is the only answer to the whole problem,’ was for me to convince Nesseth to fight Sugar Hart and that that would straighten things out, as far as Carbo was concerned. And Sica agreed there, too. *He said that I had my head in a noose and that was the only way I was going to get the thing straightened out, was to grab hold of Nesseth and make him take the fight with Sugar Hart.*” [6 R.T. 733. Emphasis supplied. See Indictment: Counts 1, 4, and 5.]

On this same occasion Palermo informed Leonard that Del Flanagan, another ranked welterweight fighter managed by Akins’ manager of record, Bernard Glickman, was controlled by the Carbo group. [6 R.T. 733; 32 R.T. 4783-4787; 29 R.T. 4244-4245.]

At the time of Sica’s unexpected appearance at the Beverly Hilton Hotel, there was neither a business nor a social relationship between Leonard and Sica. Sica’s opinion, interest, or advice were neither solicited nor desired by Leonard. [6 R.T. 720.]

Leonard described his reaction to Sica’s appearance as follows:

“Well, the minute I seen him I remembered what Carbo had told me before about somebody on the west coast taking care of me and for once I was scared, when I seen him.” [6 R.T. 721.]

Then Leonard explained why Sica's presence with Palermo frightened him:³

"Well, by reputation I had always known of Joe Sica as an underworld man and a strong-arm man."
[6 R.T. 722.]

On Sunday, May 3, 1959, Nesseth met Leonard and McCoy at the Hollywood Legion Stadium, and Leonard placed a telephone call to Gibson's home in Chicago. The call was connected at 1:30 p.m., Los Angeles time and lasted nineteen minutes and four seconds. [Ex. 17.] Nesseth testified:

"I called—I believe Jack made the call to Truman and I talked to him and I told him that—of the threats that had been made to us and of the harassment that we were constantly under, and that I wanted him to call his boss and to call off the dogs. Those were my words.

And he said, 'When you say my boss, you mean Mr. Norris?'

And I said, 'Of course, I mean Mr. Norris;' that if he didn't call Norris and have these people out of town and leave us alone, that I was going to call his—the sponsors of the television shows and tell them just what kind of people they were dealing with.

* * * * *

³Leonard and Nesseth's testimony with respect to this essential element—fear—in an extortion case was carefully reviewed in advance with the Court, out of the hearing and presence of the jury. The Court was advised by Government counsel that the victims' testimony concerning Sica's and Dragna's reputation would be circumscribed so that their full knowledge thereof and the basis in fact therefor would not be disclosed to the jury. Long in advance of trial, the Government briefed this problem for the District Court. [6 R.T. 706-707, 716; I C.T. 356-366.]

[A]nd Truman said, 'Well, I am not threatening you.' And I said, 'No, you have never threatened me, but these other people are and if it isn't settled, I am going to make these phone calls.'

Truman said, 'Well, all the pressure can be relieved and you can also do your own Jackie Leonard a favor by saving his Club, if you will just agree to fight Sugar Hart.'

And I told him they could forget that, because I had better things in mind and I wasn't going to fight Sugar Hart.

We must have talked for probably 15 minutes and Truman agreed that he would call Norris and see what he could do about getting these people out of town." [13 R.T. 1830-1831. Emphasis supplied. On cross-examination Gibson substantially corroborated Nesseth's version of this telephone call. [32 R.T. 4684-4692.]

The next morning, Monday, May 4, 1959, Nesseth went to Leonard's office at the Stadium. [6 R.T. 727; 13 R.T. 1831.] Leonard informed him that Palermo wanted to see him that afternoon at Leonard's office. [13 R.T. 1832-1833.]

Leonard told Nesseth about the session that weekend at the Beverly Hilton Hotel with Palermo and Sica and that he had been told to pass on the following message to Nesseth:

"The message was that I had to get in line and straighten this thing out, that we're in bad trouble and if I wanted to ever do anything in boxing, I better get in line and sit down and straighten it out with them." [13 R.T. 1836, 1842. Emphasis supplied.]

While Nesseth was in Leonard's office on May 4, Nesseth testified:

"... Blinky Palermo and Louie Dragna walked in, and Blinky said, 'I want to talk to you.'

And I got up and said, 'Well, I don't want to talk to you,' and I walked out." [13 R.T. 1833.]

Nesseth had never met Dragna before that moment nor had he had any business with him. [13 R.T. 1833.] As he left the room, Nesseth made up his mind to call the authorities. [13 R.T. 1834-1835.] Upon leaving Palermo and Dragna with Leonard in Leonard's office, Nesseth contacted the authorities. [13 R.T. 1835-1836.]

The following day Nesseth was given police protection by the Los Angeles Police Department. He was asked to describe his state of mind prior to receiving this protection:

"... I was in fear that there—there may be attempts to carry out the threats that had been made.

As I have testified, I had called Truman Gibson and asked him to do what he could to get rid of these people that were bothering us, and the next day, which was Monday, Leonard told me he had a meeting the night before with Palermo and Sica. That afternoon I am confronted by Louie Dragna, or his presence was there in the room when Blinky wanted to talk to me.

These people had no reason to want to talk to me. They had nothing to do with boxing. I knew them by reputation and I knew ... that the threats had been made on numerous occasions, and one of them had been Carbo had friends out on the

Coast. Inasmuch as these people had no connection with boxing, I had reason to be afraid for my physical person.” [13 R.T. 1864-1865.]

Nesseth was asked what he knew of Sica by reputation. He testified:

“I knew Sica by reputation only as being an underworld figure.” [13 R.T. 1865.]

The same question was put to Nesseth with respect to Dragna. He testified, “The same.” Then he explained that he meant:

“[T]hat he was an underworld figure, in my opinion.” [13 R.T. 1865-1866.]⁴

Leonard testified that he recognized Dragna as he entered his office with Palermo on the afternoon of May 4, 1959, and that Nesseth immediately got up and left:

“And Blinky Palermo said something to him about, ‘Come on, I want to talk to you,’ and Nesseth just kept going, he didn’t stop.” [6 R.T. 728.]

Leonard continued with the events that followed Nesseth’s departure as follows:

“Well, Blinky says, ‘Jesus, I want to talk to the fellow.’ [Referring to Nesseth.]

I said, ‘Well, you are going to have to get with him and sit down and talk to him.’

He says, ‘How in the hell am I going to do that? What am I going to have to do, grab him and shake him and set him down?’

I said, ‘I don’t know how you are going to talk

⁴See footnote 3, above.

to him. No use talking to me. You are going to have to talk to Nesseth.'

He said, 'I want to talk to you a little while.'

And he and Dragna sat down and I started telling them about Truman, he should see Truman and not me.

He said, 'No, I want to talk to you. Leave Truman out of this.'

He turned to Mr. Dragna and said, 'I want you to hear this.' And he started explaining about that I was supposed to pay 15 per cent of the Jordan purse and he said, 'Jesus Christ,' he said, '*I even have had to tell "The Gray Man" he was going to get 15 per cent. What do you think of that?*' He said, 'He put me in the middle with him, too. What do you think of that?'

Dragna says, 'Well, you are wrong there, Jackie.'

And then Blinky went on to explain the whole thing, that he thought that I should get Nesseth to get Don Jordan to fight Hart, who he had control of, or he had told me he had control of.

And I told him, well, I didn't think under any circumstances he was going to fight Hart.

And he says, 'Well, how about Flanagan? You mentioned Flanagan at the hotel.'

I told him, 'I don't think he will fight anybody that you fellows are connected with, the way you are putting it now.'

He says, 'Well,' he says, 'he is going to have to do something because I am really in trouble and I got to straighten this thing out.'

He turned to Dragna and he says, 'What do you think of it?'

Dragna says, 'Well, you are wrong, Jackie. You are dealing with big people and your word should be your bond.' He says, 'After all, if your word is no good, then you are no good in this game. Everything is dealt—you are dealing with real nice people and big people, and if your word is no good you are no good in this game.'

I said there was nothing I could do about it, that Truman Gibson had put me in the middle. He said everything would be all right and he would fix things up when he got back East, and he just didn't do it.

Palermo started screaming and hollering at me, that it was me they was looking to, that they didn't give a dam [sic] about Truman Gibson, they didn't make any arrangements with him. That Truman had turned it over to me and I had made arrangements and I was the man and that was it.

In the conversation Mr. Dragna asked me if Don Nesselth didn't live out his way.

I said, 'Well, I think he lives out somewhere near San Bernadino.'

He said, 'No, it is West Covina, isn't it?'

I said, 'Yes, I guess it is.'

In the conversation he said, 'He has a wife and kid, doesn't he?'

I said, 'Yes, he has a wife and a boy.'

And Palermo started screaming again that *something had to be done to get hold of Don Nesselth and straighten this thing out, if I had to grab him and shake him and get him in line, to sit down and talk to him.*

I said nothing like that was going to happen. I said, 'If Don wanted to talk to you, all right.' If he didn't, there was nothing that could be done about it, that Don had complete charge of the fighter and there wasn't nothing anybody could do.

He said, *'Well, we have to make this Hart fight. At least, if I can go back and tell "The Old Man" —meaning Frank Carbo—tell him I have the Hart fight, that will take a lot of pressure off. I can tell him you tried and I tried and at least we have something accomplished.'*

He said, 'I am going to leave,' and he said, 'I want you to make sure things are taken care of.'

Dragna told me, he says, 'You are right in the middle of this thing, Jack.' And he said, 'You better try to get it straightened out or,' he says, 'you can be in a lot of trouble.' [On May 6, 1959, Palermo admitted, in a recorded conversation that Dragna had said he had heard Leonard was "going bad." Exs. 97, 96-A for Ident. at pp. 36-37.]

And Blinky told me that for me to get hold of Nesseseth and that he would call me later, and that was about the extent of that conversation." [6 R.T. 728-732. Emphasis supplied.]

As Leonard put it, Dragna said "he was acquainted with these people." In the context of the conversation, according to Leonard, "these people" connoted "Carbo and Truman Gibson and Blinky." [12 R.T. 1700.]

Although Dragna contended he had gone to the Legion Stadium to discuss with Leonard whether he should purchase a fighter named Toluca Lopez [38 R.T. 5627], Leonard testified that *nothing* but the demands of Carbo

and Palermo with respect to Jordan's future was discussed. Leonard had never had any business relationship with Dragna, and Dragna's views on the extortive demands of Palermo and Carbo were neither solicited nor desired by Leonard. [6 R.T. 733-734; 11 R.T. 1518.]

Dragna admitted on the witness stand that when he entered Leonard's office (1) he knew Palermo would be there expecting him [38 R.T. 5622, 5678], (2) that Leonard was talking to Nesselth when he arrived and Nesselth departed without talking to him [38 R.T. 5681-5684], (3) that the Hart fight was discussed between Palermo and Leonard in his presence [38 R.T. 5691], (4) that he said that Nesselth lived in his neighborhood in West Covina [38 R.T. 5695-5697], (5) that Palermo said that Leonard owed him money in connection with a fighter and that he (Dragna) ventured the opinion to Leonard that Leonard was wrong in this transaction [38 R.T. 5699-5701], (6) that none of this was any of his business [38 R.T. 5702], and (7) that he expressed his opinion that Leonard was wrong when Palermo requested his views. [38 R.T. 5702.]

Leonard was asked what his reaction was to Dragna's appearance in his office on May 4, 1959:

"Well, the same thing, I thought of Mr. Carbo right away, what he told me, he was going to have somebody on the West Coast come out there. Although I didn't know Mr. Dragna, by reputation I always heard he was connected with the underworld." [6 R.T. 734.]⁵

⁵See footnote 3, above.

Also, on the day of Dragna's visit, pressure on Leonard was further increased when Underwood sent a five day notice of lease termination to the Hollywood Boxing and Wrestling Club and notified the firm which had posted a \$20,000 penal bond for the Club (when the Olympic Auditorium cancelled its bond) with the California State Athletic Commission that Hollywood Post 43 was withdrawing its \$20,000 in Government bonds held as security for the penal bond. [32 R.T. 4661.]

On the evening of the same day, Leonard received a number of telephone calls at his home from Palermo and Sica, in which they told him to come to a restaurant where they were waiting for him with Dragna and George Raft to see if they "couldn't sit down and straighten this thing out." [6 R.T. 736-737.]

At 12:06 a.m., Tuesday, May 5, 1959, Gibson telephoned Palermo at the Beverly-Hilton Hotel from his home in Chicago. [Exs. 34, 85-A, 85-B, 85-C.] The call was made person-to-person to Palermo under his alias "George Tobias". The calling party gave the correct room number for Palermo: Room 663. The conversation lasted twelve minutes and thirty seconds. Gibson admitted that he told Palermo on the telephone that he should get out of town because of what Leonard had related to him in his call on May 3. [31 R.T. 4647.]

On or about May 5, Gibson also telephoned Daly in New Jersey and arranged to meet with him in Los Angeles on May 11, 1959, to handle the crisis at the Legion. [32 R.T. 4662-4663.]

During the day of May 5, 1959, Leonard visited the offices of the Los Angeles Police Department. [6 R.T.

737-738.] Early that evening he was escorted by Sergeant Conwell Keeler of that Department to his home in Northridge. With Leonard's consent, Keeler connected a tape recording machine via an induction coil to Leonard's telephone receiver. [44 R.T. 6708-6711.] Exhibit 177 is a tape recording made by Keeler when Leonard received a call from Palermo that evening. The full text of that recording was read into the record during the Government's closing argument. [49 R.T. 7547-7554.]

Leonard told Palermo he could not persuade Nesseth to have his fighter, Jordan, meet Sugar Hart, but that Nesseth seemed interested in a proposed Jordan-Flanagan fight. Palermo said: "That's very good. That will get you and I off the hook." (Flanagan had the same manager as Akins, Bernard Glickman.) [Ex. 177; 29 R.T. 4244-4245.]

Palermo then told Leonard that he had "an appointment to call Truman [Gibson] with you." Palermo suggested that Leonard meet him at "Perini's" (meaning Perino's Restaurant) for this purpose. Leonard demurred on the ground his wife's sister was in the hospital. Palermo said Leonard should take a cab to Perino's after his wife arrived home. Leonard stalled, saying he did not want to leave his wife alone, at which point Palermo declared: "What the hell are we going to do? I've got to get a hold of Truman [Gibson] with you", and that "I just got a message from our friend." [Ex. 177.]

Palermo told Leonard during this conversation that they had to get hold of Gibson by 12:00 o'clock that night and that, "You've got to be with me. I've got to tell you what to say." Palermo became more insistent

and told Leonard that he had to be there: "You have to make it." Palermo warned Leonard: "Don't mention no names", and repeated that, "I've got to tell you what to tell him." Palermo advised Leonard: "Joe's [Sica] going to be here at 9:00 o'clock." [Ex. 177.]

Palermo told Leonard that Daly and Gibson were going to take the Hollywood Boxing and Wrestling Club out of Leonard's hands. Palermo was concerned over Leonard's state of mind and told him that, "We're not—I'm not hostile with you." Then, admitting his own knowledge that Leonard's wife was frightened by the threats which had transpired, Palermo stated: "Tell your Missus that." Palermo said: "We got our neck into something", to which Leonard rejoined, "The telephone call I got the other day [referring to the death threats of April 28] they was hostile. They were really screaming at me", and Palermo started to explain but changed his mind: "But the son-of-a-bitch—he had no right—oh, I didn't mean that, that don't mean nothing—on the phone, that don't mean nothing." [Ex. 177.]

The next morning, May 6, 1959, Leonard found Sica waiting for him at the Legion Stadium. Sica wanted to know if Leonard had made contact with Nesseth and McCoy and whether he had "got this thing straightened out yet." [16 R.T. 738-739.] Nesseth and McCoy arrived and were introduced to Sica by Leonard.

When Sica entered the room he was described by three witnesses to have surveyed the room in a suspicious manner as if looking for a concealed listening device. [16 R.T. 745-746; 13 R.T. 1848-1849; 15 R.T. 2121-2122; 17 R.T. 2457-2458.] One witness, Sergeant Boyle of the Los Angeles Police Department Intelligence

Division, testified that Sica even went to the extreme of backing out of Leonard's office in order to inspect the walls of the hallway and the door frame. [17 R.T. 2457-2458.] The ensuing conversation among Leonard, Nesseth, McCoy and Sica, later joined by Palermo, was recorded by officers of the Los Angeles Police Department with the aid of a microphone concealed, with Leonard's permission, in his office. [16 R.T. 2337; Exs. 96, 97; Ex. 96-A for Identification.]

Sica began the meeting by insisting that Nesseth make a decision so that Palermo could leave town. [Exs. 96, 96-A for Ident. at p. 1.] Nesseth reminded Sica that phone calls had been received from New York and that they had only one or two days more in which to save Leonard's "neck". [*id.* at pp. 1-2.]

Apparently satisfied that no outsiders were present, Sica arranged by telephone to chauffeur Palermo from the Beverly Hilton Hotel to Leonard's office. [*id.* at pp. 4, 8.] When Sica returned with Palermo, Palermo asked Nesseth whether Leonard had advised him of the details of the arrangement concerning Jordan. Nesseth acknowledged that he was aware that a 15 per cent commitment had been discussed between Palermo and Leonard, but that he (Nesseth) had turned it down. [*id.* at pp. 11-12.]

Sica purported to summarize his understanding of the Leonard-Nesseth-Jordan relationship, basing his summary upon meetings with Palermo and Leonard in the last few days. After tracing Jordan's ascendancy to the welterweight crown, Sica claimed that when Jordan got "a title shot . . . [Leonard] dealt with some other people, and by dealing with these people, there were certain commitments was made. . . ."

Then Sica said:

“Now, when you fellows got lucky and you won the title, there were certain things that were supposed to be fulfilled. . . .” [*id.* at pp. 13-14.]

One of the *things* that Palermo and Sica claimed that Nesseseth and Leonard *were supposed to fulfill* in return for Jordan's chance to win the welterweight title was a commitment to defend his title against Sugar Hart or Del Flanagan. Nesseseth replied that he was not going to have Jordan defend his title against anyone but Moyer, a bout for which contracts had already been drawn. [*id.* at pp. 14-15.]

Then Nesseseth explained that he had worked hard for more than two years, grooming Jordan for the title. Palermo interrupted him and asked: “Well, do you think you got the title fight on your own?” Nesseseth replied, “Yah, I think I got—I think I got the title fight. As far as I'm concerned, I got it on my own.” Palermo's rejoinder was: “You did like fun get it on your own.” [*id.* at p. 16.]

Palermo admitted that he had told Leonard in a telephone call that there would be no title fight. [*id.* at pp. 17-18.] He further admitted that he had told Gibson in Chicago that there would be no fight in Los Angeles until he had been assured by Leonard that Leonard was “the boss of the fighter.” He further acknowledged the accuracy of Leonard's description of the two telephone conversations between them on October 23, 1958. Palermo even revealed that Gibson had told him in Chicago to make his first telephone demand upon Leonard on October 23, 1958. [*id.* at pp. 19-26.]

Palermo repeatedly attempted to persuade Nesseth to admit that Leonard was wrong in assuring him that Leonard was Jordan's boss rather than Nesseth:

“Palermo: Well, I'm asking you, I'm asking you an honest question. Do you think it was right for him to inform me like that?

Nesseth: I'll tell you the truth. I'm a square. I think it was as right as it was for you to demand half the fighter.” [*id.* at p. 26.]

As the argument progressed Palermo alluded to Leonard's meeting with Carbo in Florida:

“Palermo: Let me tell you something; you made that commitment in front of someone else, too, you know; that you were the boss.

Leonard: I didn't even talk to him until way after the fight. That was after the fight.

Nesseth: Who else did you talk to about the fight?

Palermo: He knows who he talked to. . . .”
[*id.* at p. 29.]

Continuing the argument over the *propriety* of Leonard's assuring Palermo that he was Jordan's boss in order to avoid cancellation of the title fight set for December 5, 1958, Nesseth and Leonard explained to Palermo and Sica that Leonard was acting under instructions from Gibson who controlled Leonard's fate as a promoter. [*id.* at p. 27.] Palermo objected to these statements: “Truman don't think like that, Jack. We don't think like that.” Then Sica chimed in: “We didn't see what Jackie was trying to do. . . .” [*id.* at p. 31.]

Still later, an oblique reference to Dragna was made when Leonard objected to Palermo's bringing: "the other guy in. What the hell did you bring him in here for?" At first Palermo indicated ignorance of the person to whom Leonard was referring. Sica took offense at the remark, inferring that Leonard was referring to him:

"Sica: . . . You feel there's some type of repercussions by me coming in here?

Leonard: Oh, no—I was just wondering.

Sica: I came in here as a friend to you to see that you get straightened out.

Palermo: That's a very bad remark to make to a guy, a friend of yours for twenty years.

Leonard: . . . [Unintelligible] that was the other guy.

Palermo: I didn't know the other guy.

Leonard: . . . [Unintelligible] story.

Palermo: I don't know the other guy who told me. He didn't say nothing.

Leonard: He sat there when you told him—

Palermo: *He talked to you and he said he heard you were going bad, that's all he said.* . . . [Unintelligible.]” [*id.* at pp. 36-37. Emphasis supplied.]

Sica and Palermo persisted that Nesseth agree to a Jordan-Hart fight to "take everybody . . . off the spot." Sica pointed out that "Truman and Jackie are the guys on the spot." Nesseth replied: "There's only two ways it can be solved right. One way is you guys can control the fighter, the other way is I fight Hart. Either one of them aren't actually very attractive to

me. I don't see where I gain anything by either one." [*id.* at pp. 44, 47.]

Nesseth continued to blame Gibson for Leonard's assurance to Palermo that he was Jordan's boss, pointing out that Gibson was the first person to tell Palermo that everything was arranged with respect to the Jordan title fight. Palermo replied that he "never took his [Gibson's] word for it." [*id.* at p. 55.]

Palermo stated that he had wanted to be in California on October 23 in order that he could handle Nesseth himself, but that Gibson had told him "Jim [apparently James D. Norris] says, 'It's better that you don't go out there,' " and that Gibson assured him that he would "handle everything. . . . So he told he [sic] handled everything. But we [apparently Carbo and Palermo] didn't take his word for it. . . ." Palermo then explained that this was why he returned to Chicago. [*id.* at p. 56. A description of what happened when Palermo returned to Chicago in November of 1958 and told Gibson that he had a part of Jordan's contract is set forth above in this section.]

Nesseth called Palermo's attention to the recent threatening telephone calls and Palermo replied by explaining the connection between the threats from him and Carbo and Gibson's financial pressure upon Leonard:

"Nesseth: I'd like to make one thing clear right now, that I don't think all these phone calls and all this harassment are necessary, do you?

Palermo: No, no, I don't agree with that. I don't agree with that. I don't agree with that at all. You're right. That's out. There ain't going to be no harassment, that's out of the question.

There never was going to be any, but see where the heat and this comes in, Jack. . . .” [*id.* at pp. 58-59. Emphasis supplied.]

A moment later Nesseth pointed out to Palermo that Leonard was going to be evicted from the Hollywood Legion Stadium on Friday at midnight. Palermo replied: *“It don’t have to happen if we can get things ironed out . . . [Unintelligible], I can go to bat and see that he gets it in a second. He knows that. I told you that, didn’t I?”* [*id.* at pp. 59-60. Emphasis supplied.]

Sica impressed Leonard with the gravity of his situation:

“Sica: Well, let’s go, Frank. Jackie, you got yourself in a hell of a spot with this thing. It’s terrible. How could you let people doublecross other people? That’s all it is.” [*id.* at p. 68.]

The theme recurred:

“Sica: Dan, you are in a hell of a spot with these people.” [*id.* at p. 68.]

As the session drew to a close, Palermo changed the subject and asked Nesseth whether Nesseth had told anyone about Palermo’s visit at the Kingsway Hotel in St. Louis the day after the Jordan-Akins fight in April, described above:

“Palermo: See what I mean? Did you tell anybody about the St. Louis thing at all?

Nesseth: Tell anybody what?

Palermo: About I was in St. Louis with you?

Nesseth: Sure. I didn’t tell anybody, they told me.

Palermo: Who's that?

Nesseth: People.

Palermo: People told you that? How in the hell would they know it?

Nesseth: Well, it's a guy came up to my room five minutes after you left.

Palermo: Who was that?

Nesseth: A cop.

Palermo: *Oh, a cop?*

Nesseth: Yah.

Palermo: *Did you tell him what we talked about?*

Nesseth: Yah, I told him what we talked about.

Palermo: *You told him about the fifteen per cent, too? You didn't tell him about the fifteen per cent, did you?"* [*id.* at p. 70. Emphasis supplied.]

As Sica and Palermo were leaving, Leonard testified that Sica had made a point of approaching Leonard who was still seated, leaning over and, in an ominous voice said, "Jackie, you're it." [6 R.T. 745.]

Nesseth testified that he saw Sica lean over Leonard who was seated at his desk. ("[H]e just leaned over and said it in his ear.") [13 R.T. 1849-1850.]

As Sica entered the hallway outside of Leonard's office he stopped and spoke with Salvatore Casarona, also known as Tom Stanley, a fight manager called as a defense witness by Sica. [20 R.T. 2851.] Five minutes later, Stanley came back to Leonard's office and related to Leonard the following threat from Sica:

"Leonard: He told me that Sica had called me a young punk and that I wasn't going to get away

with this thing, that I had doublecrossed everybody in the boxing business and I was bound to get hurt.

And then he went ahead and told me that—Tom gave me some advice and told me I shouldn't be doing this, I should tell Nesseth and McCoy to go to hell because Carbo and Blinky and Sica and these fellows could help me a lot and keep the Legion open, and that I was going to lose it. That all that Nesseth and McCoy would do was to cause me to get into a lot of trouble and get myself hurt.” [43 R.T. 6356-6357; 20 R.T. 2852; 37 R.T. 5564.]

Under cross-examination, Sica tried to explain away his visit to Leonard's office that morning as an effort to find out why Leonard had not come to Perino's Restaurant the night before. [37 R.T. 5495-5498.]

Within hours of Sica's and Palermo's departure from Leonard's office, Manuel Dros, Leonard's assistant matchmaker, received a telephone call from Willie Ginsberg. Ginsberg told Dros to call Sica from a public telephone. Ginsberg provided the number. Dros went to a public telephone and called Sica.

Sica asked Dros if he knew when Chargin would be arriving in Los Angeles, that “Chargin had an obligation toward him.” Sica also wanted to know where Chargin would be staying and the telephone number at which he could be reached. Then Sica told Dros, an employee of Leonard's, that he “was working for the wrong people.” Dros replied “. . . they employed me and I was grateful, that I would try to find out the information so desired, to give me a call at my home that night.” [15 R.T. 2204-2206, 2210; 37 R.T.

5559-5564.] Sica called Dros at his home at about 7:00 p.m. and Dros told him that he had been unable to get the information. [15 R.T. 2207.]

At the time of this conversation, negotiations were in progress for Chargin to become a partner in the Hollywood Boxing and Wrestling Club. The negotiations had been reported in the newspapers. [15 R.T. 2209.] Prior to this day Dros had never had any business or social dealings with Sica. [15 R.T. 2210-2211.]

At approximately 11:55 p.m. the same night, Palermo was questioned by Captain James D. Hamilton of the Los Angeles Police Department. In answer to Captain Hamilton's questions, Palermo stated that he was in Los Angeles on a social visit, that his trip did not have any business purpose; that he had never heard of "Louie Dragna"; and that he had not seen the "Sica boys" during his stay and only knew them "to say hello to." [42 R.T. 6212-6218. Of course, Palermo had been with Sica only hours before and with Dragna two days earlier—on both occasions in Leonard's office. He had also been with Dragna on May 1 in Puccini's Restaurant and with Sica on May 2 or 3 at the Beverly Hilton Hotel and on May 5 at Perino's Restaurant.]

On May 7, 1959, Leonard had a telephone conversation with Gibson. Leonard testified:

" . . . He told me to tell Nesseth that he had taken care of the matter he had talked about, that Jimmie had told Palermo to get out of town, that they didn't operate that way, and he asked me if I wanted anything further on the Hart matter, on the Hart fight. And I said, 'No, there is noth-

ing' they could do with Nesseth on it and he said, *'Well, it's too bad, I could have saved the Club if I could have made that fight, then he could have given me money to have saved the Club.'*

Leonard made a memorandum of this conversation while he was talking with Gibson. [12 R.T. 1691-1694; Ex. 69 for Ident. Emphasis supplied.]

At 1:42 a.m., May 11, 1959, Daly placed a station-to-station telephone call from his home in Englewood, New Jersey to the residence of Margaret Dougherty, about 100 miles to the south in Upper Darby, Pennsylvania. [Exs. 30, 167, 100-102, 176, 101-A for Ident. at pp. 46-47; Exs. 28, 52; 4 R.T. 487-488; 5 R.T. 651, 654; 39 R.T. 5890.] The call lasted 10 minutes. During this conversation Daly spoke with Carbo. Daly told Leonard in a tape recorded conversation three days later that Carbo arranged to meet him later that morning. The meeting was scheduled for a place situated about 40 or 50 miles from each house. [Exs. 100-102, 176, 101-A for Ident. at pp. 24, 46-47.]

At 9:15 a.m. that same day, Daly and Gibson departed for Los Angeles from New York International Airport on Trans-World Airlines Flight 5. [Exs. 156-160, 166; Exs. 100-102, 176, 101-A for Ident. at p. 24; 43 R.T. 6323-6330; 44 R.T. 6554-6555.] Gibson admitted that he requested Daly's presence on this trip. [32 R.T. 4662-4663; 23 R.T. 3404-3405.] Upon arriving in Los Angeles they went to the Ambassador Hotel where Daly checked in at 1:12 p.m. Daly's ensuing stay at the Ambassador until 1:34 p.m., May 22, 1959, was charged to Gibson. [32 R.T. 4666; Exs. 91-A, 91-B, 91-C.] Gibson obtained quarters at the

same hotel for the day and met there with Underwood, Ogilvie, and Daly. Gibson telephoned Leonard at the Cesar Hotel in Tijuana, Mexico, and told Leonard that he wanted to see Leonard "to straighten all this mess out." Gibson told him that he had to leave Los Angeles and that he was leaving Daly there to talk with Leonard, and he (Gibson) would return in one week. Gibson checked out of the Ambassador Hotel that evening at 8:42 p.m. and returned to Chicago. [6 R.T. 750-751; 32 R.T. 4666-4669; Exs. 90-A, 90-B.]

One evening that week, Daly, Parnassus, and Underwood met with Sica at Dorando's Restaurant in Hollywood. This restaurant was owned by the father of Joey Dorando, a witness called by the defendant Sica during the trial. Parnassus, who had known Sica for twenty years, introduced Sica to Daly and Underwood. [28 R.T. 4106-4113; 26 R.T. 3720-3722; 21 R.T. 2994; 22 R.T. 3140.]

Leonard returned to Los Angeles from Tijuana on May 12, 1959. On May 13, Daly visited him at the Hollywood Legion Stadium. Leonard's office was still wired for sound and police officers were in attendance. Daly indicated to Leonard, however, that he did not wish to talk with him in his office but out in the deserted reserved seat section of the auditorium, to which they adjourned. Leonard related their conversation as follows:

"Well, Mr. Daly told me I was in a hell of a jam in two ways, he said, with the Club, what Nesseth had done in going with Cus D'Amato and myself doing the same thing. He told me—

I told him that I didn't have anything to do

with it, I didn't know anything about it except what I read in the papers. I hadn't discussed it with Nesseth.

And he said, *'Well, you are in a hell of a jam.'* And he said, 'I don't know what I can do for you.' He said, 'You have got the whole East upset.' He said, 'Everybody is blaming everybody else. Norris is upset, Gibson is upset, and Carbo is upset, and Palermo is upset.' He said, 'You have got the whole dam [sic] works upset.'

I told him there was nothing I could do about it.

He said, 'What are you going to do with the Club?' *He said, 'You owe Truman that money on the advance.'*

I said, 'I just don't know, Bill. I am disgusted with boxing. I guess I am through with boxing so far as that is concerned.' I said, 'Without these people you can't get anywhere with boxing, anyhow. I will probably get out of it. Anybody can take the Club over. I was talking to Nesseth and a few people about taking the Club over, and if they want to retain me as a matchmaker, all right, and if not, I will just get out of boxing. I have had my fill of it.' That I didn't care what happened to the Club now, I had lost it, anyhow.

He said, *'Well, that is not the only mess.'* He says *'What are you going to do about Nesseth?'* He says, *'After all, these people look to you back there.'* He says, 'You should have come to me in the first place. If you hadn't went to that dam [sic] Blinky,' he said, 'I could have saved Nesseth a lot of money.' He said, 'If you had came to me,' and he said, 'I was your friend,' he says, 'and I

would have went to Carbo and you wouldn't have had to give any money, unless it was a real big fight.' He said, 'I would have told them I was getting the 15 per cent and let Nesseth keep it.' But he says, 'You went to that Blinky,' and he says 'he will take anything to stay out of Carbo's pocket.' He says, 'Carbo had to throw him the chicken feed.' He said, '*Now you are in a hell of a mess.*' And he said, '*I just don't know how I can straighten this thing out.*' He said, '*I doubt if I can.*'

He said, 'Carbo is really boiling.' He said, 'When I left back there I talked to him a couple of nights before, and he said, 'he is real upset about this situation out on the Coast.' [See Exs. 30, 100-102, 176, 101-A for Ident. at pp. 24, 46-47.]

Bill said he had to leave then and for me to come over to the hotel the following morning and see him. He said to just give him a buzz in the lobby and I could come up to the room if there wasn't anybody there. He said to try to think about it and see if I could get hold of Nesseth, to get Nesseth to sit down and talk to him.

He said, 'I would like to straighten the thing out.' He said if he could straighten Nesseth out, that maybe he then could go back to Carbo or Norris and get the money to put the Club back on its feet. And with that he said, 'See me in the morning,' and that was about the extent of it.' [6 R.T. 751-754. Emphasis supplied.]

At 9:00 a.m., May 14, 1959, Leonard went to the office of the Intelligence Division of the Los Angeles Police Department where certain technical equipment

was installed upon his person. In a shoulder holster on the left side of his body, Leonard was fitted with a P55 Minifon, a wire recording device. [16 R.T. 2339-2341; 44 R.T. 6696-6697; Ex. 100.] As a precaution, however, the police strapped a portable radio transmitter to Leonard's right side under his arm. The transmitter switch was taped in the "on" position. It could only be received by a special radio receiver tuned to the same frequency which was kept in the possession of Sergeant Conwell Keeler of the Police Department. Sergeant Keeler took steps to make an independent recording on a tape recorder by connecting it to his radio receiver. Leonard then kept his appointment at Daly's room at the Ambassador Hotel while Sergeant Keeler took the radio receiver and tape recorder to a nearby room at the hotel where he established a listening post in order to record Leonard's ensuing conversation with Daly. The independent recordings of the same conversation are in evidence. [44 R.T. 6695-6703; Exs. 100, 176.] Exhibit 101-A for Identification is a substantially accurate transcript of these recordings. Exhibit 101 is a tape recorded copy of the Minifon wire, Exhibit 100, which has been filtered to eliminate distracting background noises. [16 R.T. 2360.] Exhibit 102 is another tape recorded copy of Exhibit 100 which has been edited by erasing obscenities. [16 R.T. 2372-2373.] Certain portions of this conversation were not played to the jury, at the request of the Government and with the consent of the defense, because they contained references to the fact that Carbo was a fugitive in May, 1959, and that Palermo was awaiting trial in Los Angeles on a petty theft charge. [16 R.T. 2287; 17 R.T. 2514-2517; Ex. 101-A for

Ident. at p. 11, line 22-p. 12, line 24; p. 46, line 15-p. 47, line 6; p. 48, lines 4-27.]

Toward the beginning of the conversation, Leonard referred to Carbo's recent threatening calls and Sica's attempts to intimidate him and his business associates, *e.g.* Don Chargin. [Exs. 100-102, 176, 101-A for Ident. at pp. 2-3, 5-6.] Then Daly began to explain to Leonard why Nesseth and Leonard were in trouble:⁶

“Daly: You see, if this geezer, this Nesseth, he shot his mouth off.

Leonard: Is that right?

Daly: He took the attitude instead of using the same diplomacy he handles when he sells automobiles, used the same fucking bull shit with them, and went along with Truman to bull shit them, you know what I mean, work it out, con them and win them over on his side. He'd 've had them eating fucking gravy to juggle opponents, did this, done that. Now he just challenged them and said, 'Go and fuck yourself. You ain't going to have nothing. You ain't going to have no money. You ain't going to have no this, you ain't going to have that.' Somebody must have made some kind of fucking promise. He wants to act as if he don't know anything about it. That's what's killing them. They're not stupid altogether. Jesus Christ, there was—he knew about it. He played possum until he got the title. They know he done

⁶The excerpts of this recorded conversation which follow have been printed without deletion of the obscenities appearing in the original recording for the reason that such editing would destroy the full impact and dilute the meaning of Daly's remarks.

it. They know he fucked them. If he had said before the fight, 'No,' but make the speeches you're making now, make them before the fight, but he don't know, he's living in a world of his own, this kid is, and he's daffy, he don't care for nobody concerned. . . ." [Exs. 100-102, 176, 101-A for Ident. at pp. 6-7.]

Then Leonard referred to Daly's intimidating remarks made the previous day at the Stadium, and Daly acknowledged them:

"Leonard: You see the only thing, like you said yesterday, Bill, you know they are not going to let anybody get away with this shit because all the champs will be doing the same God damn thing.

Daly: That's right. Fuck him the same way. It's the way this guy done it, see.

Leonard: I mean then they would lose control altogether.

Daly: Yeah, but I know what their move will be. They won't hold you. *I know what they will do. They are trying to harass you in order to make him come in line.* So if he don't come in line, they know at least, if I'll get word to them, at least you have talked to the guy, the guy just don't want to—he's just stubborn and he don't wanna, he's stubborn and he says that . . . [Unintelligible] . . . That's what I'll tell them cause he said that. Let them take their best shot at them . . ." [*id.* at pp. 8-9. Emphasis supplied.]

Daly explained the effect of Nesseth's refusal to accede to Carbo's and Palermo's demands upon Gibson:

"Leonard: I hear Truman's really in a jackpot over this bullshit too.

Daly: Oh terrible. He was highly upset. Now why. . . . [Unintelligible.]

Leonard: He told me caught hell from Carbo, caught hell from Norris. He caught hell from everybody.

Daly: Yeah, yeah, he got—got in a hell of a fucking—

Leonard: He's still in the jackpot, I guess, when he talked to me.

Daly: Sure, he's in a jackpot over it, a terrible jackpot. He says, 'What the hell, Bill,' he says, 'I honestly thought that, well, if he wins the fight, he has to lick him again,' and he says, 'then we could work it out between us.' He says, 'I never thought the guy would fucking jump the fence and carry on this way. . . . [Unintelligible] *trying to destroy me,*' he says, *'fuck them, I'll have them destroyed.'* He's fucking mad, Truman is. Why does this Nesseth want to fight with everybody for?" [*id.* at pp. 10-11. Emphasis supplied.]

Then Daly explained Carbo's and Palermo's *modus operandi* in maintaining continuing control of certain boxing champions:

"Daly: If I ever have two champions, I'd be having everybody around, you know, fucking parties and laughing and clowning. I wouldn't want to hurt nobody. This cock sucker steps out and wants to hurt everybody. Sure he did wrong if they

want to tell this fighter who to fight and everything. But they're taking that attitude for a reason. I know why they're taking it. Never told Lou Viscusi who to fight or what to do. [Viscusi was the manager of the lightweight champion, Joe Brown, whom Carbo and Palermo also controlled: See 15 R.T. 2258; 43 R.T. 6511-6512, 6520-6521; 37 R.T. 5458-5461, 5481; 16 R.T. 2328-2331.] *Carbo don't give a fuck as long as they're—they keep their income up. That's all. That's how they live. And that's how they are going to live as long as they can get away with it.*" [Exs. 100-102, 176, 101-A for Ident. at p. 11. Emphasis supplied.]

On cross-examination, Palermo was caught by surprise and answered the prosecutor with an echo of Daly's latter statement:

"Q. There was nothing wrong with what you were doing, was there? A. *I don't believe so. We have been doing this for years. This is the first time this kind of case ever came about.*" [40 R.T. 5985. Emphasis supplied.]

The conversation shifted to Carbo's threatening calls and the visits to Leonard by Sica and Dragna. Daly predicted what Sica and Dragna would say if the police were ever brought into the case:

"Daly: The first thing they're going to say to the cops, 'Somebody owes my friend, my friend's money, and I only asked them to pay it. I haven't laid—we haven't laid our hands on him.'

Leonard: One day they are real nice, oh, Jesus

Christ, they're so nice and mushy, mushy—and the next day. . . . [Unintelligible.]

Daly: I've been in on so much of this—fucking escape this thing very nicely—but this guy Don is walking on air. His fucking fighter will fuck him in the long run." [Exs. 100-102, 176, 101-A for Ident. at p. 13. Daly's last remark was clairvoyant: see Don Jordan's testimony when called as a witness for the defense: 23 R.T. 3415, 3419-3420; 26 R.T. 3743, 3773-3774, 3777-3781; 3793-3808; 42 R.T. 6291-6292, 6298-6303; Ex. 129.]

Daly explained that if Nesseth would not capitulate, Carbo and Palermo would lose control of the welter-weight title:

"Leonard: Where does Flaherty come in? Say he wanted to meet Jordan, would he be all right with Carbo and these guys, or would he be on the outs?

Daly: Uh, in this here fight?

Leonard: Yeah, say Moyer won, I mean, does he work for those guys?

Daly: Oh, not now, no, because he has no control over you people.

Leonard: No, I'm talking about Flaherty.

Daly: If Flaherty wins—

Leonard: Say Flaherty wins with Moyer, does he work with—

Daly: With them? Not now he won't work with them, because he's getting a free ride. Nesseth is giving him a free ride.

Leonard:. . . . [Unintelligible.]

Daly: If he was getting a crack at the title, *though The Combination*, they would retain their

piece for Moyer. Sure Flaherty will give up. Sure.

Leonard: He always swears he didn't give up and all that shit.

Daly: Yeah, he gives up to Norris and to Truman.

Leonard: He set up there one day and said, 'I don't give up to no son of a bitch. I'm independent.' He says, 'I wouldn't give a guy ten cents.'

Daly: Well, shit, Kearns and I had a piece to show in fucking, in—what you call it. I collected the money.

* * * * *

Daly: It's all—one hand washes the other. It don't mean nothing, though. Independent of what? Fucking business—real estate guy. If you and I had a real estate business and there's a piece of property over there for sale, and you got it under control, and I say, 'Well, I got a buyer,' you say, 'We cut the commission.' They do it in the banks. They do it in real estate. They do it all over. Independent. What's—sure Flaherty's independent. They wouldn't tell Flaherty who Moyer's going to fight.

Leonard: . . . [Unintelligible.]

Daly: *As long as the loot kept coming in. That's their fucking pitch is the loot.* The fucker, anybody can tell anybody to fight . . . [Unintelligible], Jesus Christ, they couldn't tell Weill who to have Marciano to fight, or—

Leonard: There's one thing about him, too. I guess he was in good with him for years and years.

Daly. Who? Weill?

Leonard: Uh huh. (Indicating yes.)

Daly: *Fucking pays off like a fucking slot machine.* Look at the son of a bitch is a millioniare himself. For Christ's sake.

Leonard: Yeah, fight champions, or something.

Daly: I don't know, every fucking fighter they got, they love to give Weill a fucking title holder. You know, if you get—if he has a fighter, he gets *a crack at the title right away.*

Leonard: He's very close with—to The Gray then, because they were making money with him.

Daly: He's close now with The Gray. He's very close with Gray, Weill is—very close—inseparable, they are.

Leonard: . . . [Unintelligible.]

Daly: Frankie don't like him as a person. Dislikes him as a person because he's a greasy, fucking pig. But—

Leonard: He cut up millions with him.

Daly: Business transaction, that's all. Frankie don't want him around even socially with him, because he's a fucking—now Weill and Viscusi, you know, them guys are the old standbys, standing by. For Christ's sakes, if I had a fighter, if I had a champion, I'd certainly make a deal with him." [Exs. 100-102, 176, 101-A for Ident. at pp. 14-16. See Section B, above, for discussion of Carbo "holding trial" for Leonard for not matching more of Weill's fighters and for reference to Carbo's and Palermo's telephonic demand of \$2000 from Viscusi.]

Daly remarked that he could not understand what Carbo's and Palermo's plan was in making calls to Leonard but not attempting to contact Nesseth directly. He inquired of Leonard whether Nesseth had ever met Carbo. Leonard indicated that he did not think so. [Exs. 100-102, 176, 101-A for Ident. at pp. 18-20.] Then Daly inquired of Leonard whether Nesseth was acquainted with any members of the underworld community in Los Angeles:

"Daly: Does he know these fellows around here? Does he know—

Leonard: He knows who they are. He doesn't know them, personal.

Daly: He don't know Mickey or anybody?

Leonard: No, uh uh. No, the other day is the first time he ever met Joe Sica. And when Blinky walked in first with Dragna, he just walked out, Don did. And Blinky didn't try to stop him or talk to him or anything. Then the next day when he came in with Sica, well, he said, 'I'm going to sit down and talk with you.' So he sat down for about—about an hour, I guess, but Blinky was screaming and hollering and—'It's not the money. We want to know what you're going to do with the fighter. We want the money, but,' he says, 'We want to know who he's going to fight and where he's going to fight or who he's going to fight.'

Daly: They want one match to get rid of you.

Leonard: Yeah, they insisted on Hart.

Daly: They want to get rid of it, yeah.

Leonard: He kept—

Daly: I don't know whether Jordan can lick Hart.

Leonard: He kept saying that Carbo's going to be madder than a son of a bitch, and that he was mad already, but he's going to be madder yet.

Daly: Blinky handled this. He's dying himself, Blinky is, for fucking it up. And what makes them look bad with Glickman is—here's Glickman, they say 'You don't—let us handle this here deal.' Jesus Christ, and Glickman is, I guess, calling up Frankie, 'Say, huh? You've made a pretty good fucking deal.'” [Exs. 100-102, 176, 101-A for Ident. at pp. 20-21. Compare the testimony of Akins' manager, Bernard Glickman, when called as a witness by the defense: 29 R.T. 4246-4250; 4258-4271, 4273-4288; 43 R.T. 6487-6492.]

Daly made it clear that Nesseth and Leonard were challenging an established institution: Carbo's permanent control of the lightweight and welterweight championships:

“Daly: One thing, if you get the fucking title on your own, they don't interfere with you. You know, if you get through. *If you bust through the barrier. If you get through, they don't interfere with you.* They're pretty much on the level that way.

Leonard: There ain't no chance getting the lightweight or welterweight title, though, unless you do own him.

Daly: No.

Leonard: I don't know; how many years have they had it? He told me—he said, 'This is the first time in 25 years I got screwed like this.' Well, you go right back: Saxton, Bratton, Gavilan, you can go from there on.

Daly: That's right. You could go back. How many years he say, 25?

Leonard: Yeah." [Exs. 100-102, 176, 101-A for Ident. at pp. 22-23. Emphasis supplied.]

Daly mentioned a telephone call from Carbo after one o'clock in the morning on May 11, 1959; Carbo was furious about Leonard and Nesseth. That same day Daly met Gibson and flew to Los Angeles with him. Gibson was upset, saying he was in a "jackpot" because he allowed the title to get out of "their" hands. Daly concluded: "He doesn't want to grab another Nesseth as long as he lives." [*id.* at pp. 23-24.]

Daly spelled out the operations of the conspiracy between the I.B.C. management and the Carbo group:

"Daly: Oh, Truman's all fucked up, too.

Leonard: Well, he told me—you know he met Frankie. He told me that, 'Jesus Christ, the man down there is giving me holy hell. You know I'm in a hell of a jam, and on top of that, Norris is mad.'

Daly: This is the first time that proves to Norris that Truman was wrong. He had a . . . [Unintelligible] this time. He okayed the fight. He didn't get the full okay out here, but he okayed you anyhow. But that's neither here nor there. But Don was in the conspiracy to fuck them, you know." [*id.* at p. 30. Compare Palermo's statement, above, on May 6, when he acknowledged that Gibson had said that he had "handled everything" in Los Angeles.]

Then, the discussion shifted to the current pressure tactics in Los Angeles in which Palermo and Sica were

involved. Daly used this as a springboard for an extended, detailed explanation of the attempted murder of another boxing figure who had challenged the Carbo monopoly, Ray Arcel. Leonard related a threat that had been relayed to him from Sica. [See 43 R.T. 6355-6357.] Leonard inquired as to the reason why Sica was getting involved in something which was not his business. [Exs. 100-102, 176, 101-A for Ident. at pp. 31-32.] Daly supplied the answer:

“Daly: Well, then, people in New York do them favors.

Leonard: Yeah. Then I guess Blinky’s connected with what? The Longshore outfit?

Daly: Yeah . . . [Unintelligible] that’s one of his outfits. *They’re up to something with Nesseth. They’ll get—throw some fucking—*

Leonard: Bomb?

Daly: *Bomb his porch off or something.*

Leonard: You know they didn’t like about Arcel. You know Arcel thought he was pretty smart, too.

Daly: Lucky thing Arcel didn’t die.

Leonard: Yeah. They never did get him either, did they?

Daly: No. . . . [Unintelligible.]

Leonard: Did Arcel really see him or not? He probably didn’t even know what hit him?

Daly: It’s like you and I talking and somebody walking over.

Leonard: Oh, Jesus Christ. When Carbo called me—

Daly: *See what they do. They use a water pipe, see. You know, regular lead water pipe. Lead*

pipe. And about that short. About that thick. And they just get an ordinary piece of newspaper, see, newspaper don't show fingerprints. Then they take it and they wrap it just in the newspaper, see—

Leonard: . . . [Unintelligible.]

Daly: *Just an ordinary piece of paper, that's all they ever use. And you sitting in a crowd. And they try to give you two bats, and they kill you with two if they can. But they whack you twice and split your—fracture your skull, and knock you unconscious, and they just drop it. And if they drop it, they can't—and if they drop it, they can't—there's no heat. You can't—you haven't got no weapon on you. If they said you did it, what the hell, you drop it in a crowd or out in the street. They drop it immediately. After they do it they drop it. And after they drop it—the law—they're protected by the law. They have to have witnesses. They seen them come out and that's the guy, and that's what he used.*

Leonard: You know, that's what Frankie told me. He said, 'We got friends out there.' He says, 'I don't need to even leave here.' I don't know where he was at. I don't even know where he was calling from. He didn't tell me. He called direct. No person-to-person. You pick up the phone, and here he is.

Daly: . . . [Unintelligible.] That Ray was lucky he lived. The poor son of a bitch.

Leonard: He's a nice guy, you know, really.

Daly: He—he—he just got fucking stupid. He had no fucking right doing this and Ray—

Leonard: Well, he was with Carbo for years.

Daly: That's right, Jackie. He was with him for years, and Frankie gave him Teddy Yarosz, gave him this fighter and that fighter, and he always worked with him and—

Leonard: What did he do? Just didn't want to give his piece of the show, wanted to keep it all, huh?

Daly: Well, he reasoned it out with me. He said, 'Look,' he says, 'Angel Lopez knew the sponsor who I got the deal from and he wanted to be in.' And then he says, 'I figured that if I don't bother with Frankie, maybe Lopez would straighten out Frankie later.' *Son of a bitch had to be hurt. He had no right going to—if you were my partner, and somebody else comes over my head and deals with you, you know, or deals with me, it's no good. And we get all loused up. No, he didn't see who hit him. Willie Ketchum standing talking to him. [Compare Daly's solicitous feelings expressed for Ray Arcel on cross-examination during the trial: 23 R.T. 3387-3388.]*

Leonard: Willie might have seen who he was.

Daly: He went in the hotel. *No, they were both in the cellar. They wouldn't know. They used a couple kids from Boston to do it.*

Leonard: They always use professionals, guys from out of town.

Daly: Yeah, they were kids.

Leonard: Like here, if they wanted Don and I, they're not going to use somebody that we'd know around here.

Daly: *No. The Sicas would be home.*

Leonard: That's right.

Daly: *In a public place, watching Don Rickles' show.*

Leonard: And the first thing you know—boom, I'll be laying out there, and don't know what the hell hit me.

Daly: Now, I don't—I don't think—see, here's what they do. They—

Leonard: They try to reason as far as they can. Every angle they can use.

Daly: Yeah. They're going to—but they're going to—I don't know what way they're going to handle that Nesseth, but they're going to handle him some fucking way. . . . [Unintelligible.] Come to think of it, has he got a used car lot yet?

Leonard: Yeah, he works with his brother. They still got it. His brother's running it.

Daly: *You know where the joint is?*

Leonard: Oh, yeah. Yeah. It's advertised on TV.

Daly: They'll use some way that'll—" [Exs. 100-102, 176, 101-A for Ident. at pp. 32-35. Emphasis supplied.]

Daly brought up the question of why Gibson wanted him to remain in Los Angeles:

"Daly: But I'd like to get out of this fucking place here now. I got a lot of things home to try to straighten out. But Truman says, 'Wait 'til Monday.' He's coming in Monday. What'll happen Monday, Jack? I can't get heads or tails out—

Leonard: I can't see what the hell he's going to do. Unless he gets out here and talks, but—

Daly: What is it? What are we going to—

Leonard: I don't know what he wants to talk about. Because all he can talk to me about is the guy will fight Hart, and he's not going to fight Hart. He wouldn't fight Hart now, because they're all trying to force him, for a hundred and fifty thousand dollars. He asked me again the other day, 'Did you decide anything more on Hart?' I says, 'Jesus, Truman, I'm not even going to mention Hart because—' Markson mentioned Hart. Brenner mentioned Hart. Truman mentioned Hart. And these guys. It'll look like it's a deal where everybody's squeezing Hart. He's not going to fight—

Daly: He don't have to fight Hart. *You know why they're giving him the fucking squeeze.* You know, he don't know why. He thinks that they just want to steal his title and give it to Marty Stein. [Sugar Hart's manager: 31 R.T. 4642.] They don't give a fuck if it's Joe Stein or Phil Stein.

Leonard: As long as they get their money.

Daly: *As long as they get their fucking money.* So silly with his fucking ideas. [Exs. 100-102, 176, 101-A for Ident. at p. 44.]

Daly told Leonard that he had spoken to Carbo at the beginning of the week and was supposed to be contacted by Carbo again in a day or two. [*id.* at pp. 45-47. Compare Daly's testimony at trial to the effect that he had only spoken to Carbo on the telephone once in the 25 years he had known him. 23 R.T. 3366.]

Daly elaborated on the economic pressure which the defendants would bring to bear upon Leonard by fright-

ening away an investor whose capital might save the Hollywood Boxing and Wrestling Club:

Daly: What does he want to do with the joint? What have you done? Have you got a deal out there?

Leonard: I don't think we got a deal. I'll know today. Chargin was supposed to come in last night. He didn't come. He's not coming 'til today.

Daly: And he's—

Leonard: And now Joe Sica wants to see him. [See Manual Dros' testimony: 15 R.T. 2204-2207.] He's liable to screw the—it all up. I don't know.

Daly: Does Sica know Don?

Leonard: No. He read it in the paper yesterday or something. And right away he wanted to get a hold of Chargin to—

Daly: Does he know Livingston?

Leonard: No.

Daly: *They'll find out who Livingston—*

Leonard: Oh, yeah, they've checked him already. They've sent some cars up north, trying to find out where they can locate him, and who he is. Try to put the—try to scare him away, you know.

Daly: *Oh, they'll get somebody up around San Francisco to go see him, and tell him to lay off you people. . . .* [Unintelligible] You know. So. it'll make the guy think a little bit, too, you know.

Leonard: 25, 30, 40 thousand—a guy is going to stop and think you know.

Daly: Yeah, and the guy's going to say, 'Look, we don't want your money to be hurt, but *we'll*

fuck that club up every way we can.' [See Chargin's testimony concerning the anonymous telephone threat three weeks later: 15 R.T. 2236-2240] All over a fucking nitwit like Don Nesseth. You can't talk to Nesseth? He won't listen?

Leonard: No, I talk to him, Bill. Hell, there's nothing to do. He doesn't want any parts of those guys you know.

Daly: He don't want to even discuss it, huh?

Leonard: No. He don't even want to talk about it.

Daly: What's his—just says he don't want nothing to do with it?

Leonard: No, he says he don't want anything to do with it, that he told Truman that and Truman says, 'Don't worry about it,' he'd take care of it. And he says that he might have other fighters, and if he has other fighters, he's going to do the same thing with them, and that he don't want to do that. And he says he wants to—

Daly: *If he has other fighters, he won't get a fucking fight.*" [Exs. 100-102, 176, 101-A for Ident. at pp. 49-50. Emphasis supplied.]

Then, Daly explained that Nesseth's hope that he could have his fighters appear through the matchmaker at New York's St. Nicholas Arena, Teddy Brenner, was futile because Brenner was controlled by Carbo. [*id.* at pp. 50-51, 21, 24-28.]

Daly returned again to the subject of persuading Nesseth to give in to the demands of the appellants:

"Daly: He won't work to get you off the spot? You tell him you're on a spot with these guys—

Leonard: Oh, he knows the spot we're on. . . .
[Unintelligible.] He was there when Carbo called. He was in my office and—I don't know, I guess I turned white when he started screaming and threatening me: have people out here take care of me, and this and that. And I turned around and I told Don, you know, that my noose—my head was right in the noose, and he said, 'Well, Jesus, I don't know what we're going to do about it.' Like if you hear from Carbo today or tomorrow, what the hell, there's nothing to tell him. . . .
[Unintelligible.]

Daly: He's liable to say, 'Are you friendly with that Nesseth?' And I'd have to say, 'I have to say hello to him. Outside of that I—'

Leonard: You never really talked to the guy. I mean, you know—

Daly: *This Nesseth knows I know the score, don't he?*

Leonard: Oh, yeah, he knows that.

Daly: *He knows I know what's going on, don't he?*

Leonard: Yeah, 'cause he asked me yesterday if you knew, and I said, 'Sure, he knows.' What the hell, we talked before. . . . [Unintelligible.] Talked couple times before here at the hotel, you know. He knows that you know.

Daly: See, what made Truman not look too bad is when Nesseth ran away from Truman.

Leonard: Yeah.

Daly: And you. You and Nesseth, and *they got you right in there. You can't get out of it.* They pulled away from Truman, then they said,

‘Well, Jesus, Truman ain’t so fucking bad, they’re fucking Truman, too. *He must have been trying to help us.*’ ” [id. pp. 52-53. Emphasis supplied.]

The meeting concluded with Daly indicating that he expected a call from Carbo and that Carbo would not wish to talk to Nesseth because Nesseth had “told his story already.” [id. at pp. 56-57.]

On May 15, 1959, Palermo met Gibson in Chicago and received two checks payable to him totalling \$9,000 which he immediately cashed. One check was drawn on the account of Title Promotions, Inc., a corporation entirely owned by Gibson. The other check was drawn upon the account of the Chicago Stadium Corporation at Gibson’s direction. Neither corporation had any legal obligation to pay Palermo for the purposes for which Gibson and Palermo testified he was paid. Gibson and Palermo testified that the \$4,000 check was reimbursement to Palermo for expenses incurred over a period of time by Palermo for his former boxer, Johnny Saxton, who had been declared an incompetent. However, Palermo treated this check as well as the \$5,000 check, as ordinary income when he filed his 1959 income tax return. [33 R.T. 4949-4955; 34 R.T. 4999-5001; 40 R.T. 6080-6083; 42 R.T. 6205-6209; 44 R.T. 6620-6625, 6629-6634; Exs. 133, 170, 171, 172, 173, 174.]

On May 20, 1959, the California State Athletic Commission precipitously held a public hearing in Los Angeles. This hearing was the first public exposure of the conspiracy. [6 R.T. 761; 12 R.T. 1680-1681; 32 R.T. 4673.] Leonard testified at this hearing in a state of great apprehension. He had requested the in-

terrogator, Jack Urch, not to make him to appear to be a 'stool pigeon' during this hastily arranged public hearing, since three of the defendants in this case would be present at the hearing: Gibson, Sica, and Dragna. Leonard feared that the defendants would kill him if he made a public disclosure at that time. [11 R.T. 1519-1520, 1523-1524.] Also, as Leonard pointed out on cross examination, if he made full disclosure of his involvement in this conspiracy, the exposure that he had had association with these defendants might have caused the Commission to revoke his matchmaker's license which was the basis on which he earned a living. [10 R.T. 1393-1403.]

As soon as Gibson returned to Chicago from the hearing, he received a telephone call from Carbo in which Carbo questioned him about what Leonard had testified about him during the hearing. Carbo evidenced surprise when Gibson informed him that Leonard testified that Palermo had entered his (Leonard's) office. Carbo replied that Gibson must be mistaken, that Palermo had not entered Leonard's office. [33 R.T. 4932-4935.]

Frank Marrone, a New York City Police Department detective assigned to the New York County District Attorney's Office squad, encountered Carbo in the course of his official duties in a private residence near Audubon, New Jersey at 12:45 a.m., May 30, 1959. Carbo was in the home of one William Ripka in the company of Palermo's brother-in-law Alfred Cori, brother of Clare Cori. [43 R.T. 6498-6500; 39 R.T. 5486-5487.] At this time, Cori was in possession of a facsimile of the \$1,000 money order sent by Palermo to Leonard in the name of "Daley." When Marrone and

five other persons entered the Ripka house that night, Marrone had been watching the house for two hours and forty-five minutes and Carbo and Cori had been alone in the house. [43 R.T. 6499, 6501-6509.] When questioned during this post midnight confrontation, Cori explained his presence at the Ripka house alone with Carbo on the grounds that he was there to do a job as a gardener. [43 R.T. 6510.] Palermo admitted Ripka was a "dear friend" of his and that he called this house frequently. [40 R.T. 6078-6079.]

On June 4, 1959, Don Chargin was planning another trip from San Francisco to Los Angeles the following day in connection with his negotiations with Leonard to take over the failing Hollywood Boxing and Wrestling Club. While at the Ringside Bar in Oakland, owned by Chargin's partner, Jimmy Dundee (a defense witness called by Sica), he received an anonymous telephone call:

Chargin: "—and the call stated to stay out of Hollywood and that they knew my flight number and, also, that 'You saw what happened to Jack Leonard,' and that was—then the party hung up."

Sica's defense witness, Tom Stanley, testified that Leonard had been beaten up. Leonard was visited by Stanley when he returned home from being hospitalized for his injuries in June. [20 R.T. 2882; 43 R.T. 6358.]

The next day, Chargin gave a statement to the F.B.I. in Los Angeles. [15 R.T. 2225-2227, 2236-2237, 2239-2240. See testimony of Manuel Dros concerning Sica's surreptitious inquiry concerning Chargin's arrival in early May, 1959: 15 R.T. 2204-2206, 2210. See,

also, Daly's prediction to Leonard on May 14, above, that "[T]hey'll get somebody up around San Francisco to go see him, and tell him to lay off you people. . . ."]

While Leonard was recuperating in bed from his injuries, Stanley visited him at home. [9 R.T. 1303.] Leonard related Stanley's remarks in his bedroom at this time as follows:

"He asked me how I felt, and everything, and then he told me he had told me something was going to happen to me and that I knew who I was dealing with and I should have known better than to do what I did, and I should line up with these fellows."

This was the only time Stanley had ever been to Leonard's house. [43 R.T. 6358-6359.]

On June 12, 1959, Leonard signed a statement for the F.B.I. which summarized much of the testimony which he gave during the trial. [6 R.T. 762.]

During the month of August, 1959, Leonard received a telephone call from Palermo. Palermo wanted to know if Leonard "still felt the same." Leonard replied in the affirmative. Then Palermo said:

" '[W]ell, if you should change your mind, you can get all the money you want, if you just act right and be right with the right people.' "

Leonard informed Palermo that there was nothing that he could do, because he had already given his testimony. [6 R.T. 765.]

The following month, Leonard quit the boxing business. The Hollywood Boxing and Wrestling Club failed because Leonard could no longer obtain nationally known fighters:

“Leonard: I made calls all over the United States trying to get name fighters, but there was always the excuse they were busy, they would let me know later and things to that effect.” [6 R.T. 766-768.]

After spending 20 years in professional boxing as a boxer, manager, assistant matchmaker, matchmaker, and promoter, Leonard was forced to leave the Legion Stadium to become an automobile salesman. [5 R.T. 586.] The Club had been unable to pay Leonard his salary during August and September. In September the Club went into bankruptcy. [11 R.T. 1591-1593.]

On September 22, 1959, the ten count indictment in this case was returned by the Grand Jury for the Southern District of California at Los Angeles. [I C.T. 2-16.]

During the month of November, 1959, Leonard's fear of the defendants drove him to approach Palermo through his wife with respect to Palermo's offer in August, 1959, to pay him a substantial amount of money in exchange for his silence. While visiting her relatives in Pennsylvania, Leonard's wife talked to Palermo. A number of telephone conversations were had between Palermo and Mrs. Blakely which were not recorded. Thereafter, several telephone conversations between Palermo and Mrs. Blakely and between Paler-

mo and Leonard were recorded by Palermo. The proposition discussed was that Leonard and his wife would leave the country so that Leonard could not be forced to testify against the appellants, in exchange for which Leonard and his wife would be given \$25,000 so that they could afford to leave the country. [12 R.T. 1667; 8 R.T. 1032-1033; Ex. E.]

Leonard had received a number of telephone calls between the time of his public testimony before the California State Athletic Commission on May 20, 1959, and the time of his wife's departure for Pennsylvania in November, 1959, after the return of the instant indictment. These calls had intensified his fears. [12 R.T. 1663.] Threatening calls continued into the year 1961. When pressed by Palermo's counsel on cross-examination, Leonard testified that he thought that two of the threatening calls in the period immediately before the trial had been from Palermo, but he could not swear to it. [8 R.T. 1059.] Palermo's counsel also elicited from Leonard the fact that he was still in fear of Palermo's associates and had accepted protection from the police and the federal government when it had been offered to him and his family. [8 R.T. 1080-1085.]

VI.
ARGUMENT.

A. The Indictment.

1. Where Underworld Reputation Is One of the Instruments of Coercion in an Extortion Conspiracy, This Fact May Be Pleaded and Proved as Any Other Material and Relevant Fact.

Appellants complain of pleadings and proof which establish the character and method of their extortion conspiracy, and they contend that where the underworld reputations of co-conspirators have been used as a weapon to induce fear in their intended victims, this fact cannot be proved as part of the prosecution's case-in-chief. [Sica's Op. Br. 42-52; Dragna's Op. Br. 31-34; Gibson's Op. Br. 42-44.]

It is appellee's position that the allegations set forth in Count One, paragraph 3c, and Count Five, paragraph 3c, of the indictment are material and relevant to the element of fear and the reasonableness thereof, both of which must be established beyond a reasonable doubt to prove extortion. Moreover, proof of these allegations relates to knowledge and criminal intent of the appellants as members of a criminal conspiracy.

"The gist of the unlawful act is extortion. Extortion involves a state of mind as an element of an offense under the Act. Unless there is some form of compulsion (either physical or fear) there is no crime under this Act."

Nick v. United States, 122 F. 2d 660 (8 Cir. 1941); *cert. den.*, 314 U. S. 687, *reh. den.*, 314 U. S. 715 (1941).

The allegations with respect to the participation of appellants Sica and Dragna in the extortion conspiracy, and the use of their reputations in furtherance of the conspiracy, were not contrived by the Government in order to put otherwise irrelevant and immaterial information before the jury. The indictment, in all particulars, was predicated upon relevant and material facts. Gibson himself admitted *after* the indictment was returned, during an appearance before the United States Senate, that he and his corporations, the International Boxing Clubs, used the "underworld" in the conduct of their business. [See Statement of Facts, above, and 34 R.T. 5050; 35 R.T. 5127, 5130-5136.] Moreover, while threatening Leonard's life, Carbo had twice asserted that he had connections on the West Coast who would take care of Leonard and Nesseth. In addition, there was the actual appearance of both Sica and Dragna within one week of Carbo's death threats, and their intense, uncalled for interest in obtaining Leonard's and Nesseth's submission to the extortive demands of the conspirators. Insofar as Leonard and Nesseth were concerned, the physical presence of Sica and Dragna had ominous overtones, since both were well known to them as notorious underworld figures, and Sica, in particular, was known to be an underworld enforcer.

In *Bianchi v. United States*, 219 F. 2d 182 (8 Cir. 1955), *cert. den.* 349 U. S. 915, *reh. den.* 349 U. S. 969 (1955), the Eighth Circuit discussed the "reasonableness" of the victims' fear (economic loss, injury to employees, damage to equipment) in the light of the evidence, and concluded that: "Under the record such a fear would not be an unreasonable one."

Bianchi v. United States, supra, at pp. 189-190. Significantly, the Eighth Circuit directed attention to the fact that bail was denied by the trial judge because "defendants had numerous arrests, some in connection with labor activities . . . many for investigation, peace disturbances, interference with lawful employment." Among them, as catalogued by the court, were arrests for suspicion of robbery, assault, carrying concealed weapons, suspicion of bombing and intimidation. It is pointed out in the opinion that "This evidence was, of course, not before the jury for consideration."

Bianchi v. United States, supra, at p. 190.

Nevertheless, it is apparent that the Eighth Circuit was anxious to demonstrate the outrageous backgrounds of the defendants in that case in order to give added meaning to their evidentiary discussion of the victims' state of mind. *Sub silentio*, the court appears to be saying that this information reinforced their holding that the "reasonableness" of the victims' fear had been sufficiently established and the Government's burden to prove this element of extortion amply sustained.

The suggestion that this must have been the court's intent is strengthened by their citation of *United States v. Compagna*, 146 F. 2d 524, 529 (2 Cir. 1944), *cert. den.* 324 U. S. 867, *reh. den.* 325 U. S. 892 (1945), which follows immediately after their discussion of the defendants' criminal record:

"The victims' fears originated from acquaintance with the general disorders and violence which had accompanied other strikes. As such, it was part of what everybody knows, and I cannot see

how it could have prejudiced the accused with the jury. Indeed it was entirely proper for the jury to infer that the accused expected to play upon precisely such fears. . . .”

The *Compagna* decision is worth comparing with the instant case, although the issues in *Compagna* are not so broad. The defendants in *Compagna* were charged only with *conspiracy* to extort. The indictment did not contain a substantive count of extortion. The case is further distinguishable upon the ground that the defendants did not use their own reputations to induce fear in the victims. In other words, personal reputation was not an integral part of the extortion plot as it was in the instant case. In affirming the conviction, Judge Learned Hand, speaking for a unanimous court (Judges Swan and Clark), prefaced the court’s opinion with a discussion of events, pre-dating the conspiracy charged, which shed light upon the conspiracy encompassed by the indictment.

During the case-in-chief, the Government called a number of motion picture producers and exhibitors who testified that they had been moved by fear of violence ‘because during other strikes there had been stoppages in the middle of performances; stink bombs . . . in theatres; members of the audience and recalcitrant exhibitors had been assaulted.”

United States v. Compagna, supra, at p. 528.

In the opinion of the majority of the court (Swan and Clark, JJ.), evidence as to the state of mind of the intended victims “was relevant to show that the scheme proved successful as part of the proof there had been a scheme at all . . . [and] that there is a

rational connection between the existence of the criminal agreement—‘the partnership in crime’—and the fact that the acts upon which the conspirators agreed, when carried out, had the expected effect upon those against whom they were directed. . . .”

Id. at p. 528.

Judge Hand, however, questioned the legal necessity of proving that particular victims had been placed in fear by the conduct of the defendants *since no substantive act of extortion was charged in the indictment*. Had extortion itself been charged “there would, we all think, have been no doubt of the relevancy of such testimony,” although it was not necessary to establish the existence of the conspiracy itself.⁷

Both the Second Circuit in *Compagna* and the Eighth Circuit in *Bianchi* [219 F. 2d at p. 192], have frankly acknowledged what must be paramount in every ex-

⁷Judge Hand’s minority view was predicated upon a belief that relevancy was lacking in a pure conspiracy case since “the only evidence relevant to the existence of a conspiracy are facts which come, or at least might have come to the knowledge of the conspirators, among which the *undisclosed* mental states of mind of the victims . . . could not be.” [Emphasis supplied.] Of course, in the instant case, the state of mind of the victims Leonard and Nesselth was disclosed to the conspirators on at least three occasions during the period of the conspiracy. Consequently, Judge Hand seems to imply that when this occurs, the state of mind evidence is relevant *even when the substantive act is not charged*. In any event, Judge Hand did not believe that the state of mind testimony in *Compagna* constituted reversible error although it “*might have been if the testimony covertly convey[ed] to the jury an accusation of earlier and independent crimes.*” [Emphasis supplied.] Judge Hand conceded to his brethren, Judges Swan and Clark (this was adopted by the Eighth Circuit in *Bianchi, supra*) that, among other things, “*it was entirely proper for the jury to infer that the accused expected to play upon precisely such fears.* . . .” [Emphasis supplied.]

Id. at p. 529.

tortion case: that a jury should determine the *reasonableness* of the fear induced in the victims, and in doing so must consider whether or not particular defendants intended to capitalize upon and exploit the very fears which were entertained by their victims.

As shown in the Statement of Facts, above, and as will be demonstrated below, fear in the instant case was induced by the appellants through use of the underworld reputations of appellants Sica and Dragna. Carbo's threats involving connections on the West Coast had to be considered in context by the jury and thought given by them to the meaning of such terminology when communicated to Leonard and Nesselth. It is eminently proper to consider the jury's task in terms of "what everybody knows" and to assume that the jury concluded that the conspirators were preying "upon precisely just such fears," to wit, that Carbo had connections on the West Coast, meaning underworld associates, who would not hesitate to maim or kill if commanded to do so by Carbo.

Cf. United States v. Bianchi, supra.

"The proper test" to use in evaluating the character of the conduct in an extortion case, according to the Seventh Circuit, is to ask whether it is "threatening or harmless from the context in which . . . [it occurs] measured by the common experience of the society in which . . . [it is manifested]."

United States v. Prochaska, 222 F. 2d 1, 5-6 (7 Cir. 1955).

The court in *Prochaska* takes judicial notice "that the slang expressions employed [in that case] are part of the Hollywoodesque *underworld* and are essentially

synonymous with a promise of a 'one-way ride.' " [Emphasis supplied.]

Prochaska is one of a number of extortion cases, State and federal, which clearly hold that the determination of whether or not a threat has been uttered *and* whether or not the threat has placed the victim in fear—and reasonable fear at that—depends, in the final analysis, upon *all* the surrounding facts and circumstances and upon the context in which the language is uttered. Implicit in this proposition is the corollary that the prosecution must be entitled to put the conduct of the defendants in context so that a jury can sensibly evaluate the reasonableness of the fear testified to by the victims.

See, *e.g.*:

People v. Dioguardi, 8 N. Y. 2d 260, 168 N. E. 2d 683 (1960), *reh. den.* 8 N. Y. 2d 1100, 171 N. E. 2d 465 (1960);

People v. Eichler, 75 Hun. 26, 26 N. Y. Supp. 998 (1894);

People v. Thompson, 97 N. Y. 313 (1884);

People v. Gillian, 2 N. Y. Supp. 476 (1888);

People v. Fox, 157 Cal. App. 2d 426, 321 P. 2d 103 (1958);

As well as:

Nick v. United States, *supra*;

Bianchi v. United States, *supra*;

Compagna v. United States, *supra*;

and illustrative English cases which support the same principle, *e.g.*,

Regina v. Warhurst, 39 Cr. App. Rep. 100, C. C. A. (1955, Ct. of Criminal Appeal).

Application of these established principles will depend upon the facts of a particular case. For example, in *United States v. Varlack*, 225 F. 2d 665, 673 (2 Cir. 1955), the Second Circuit approved admission in evidence of a conversation between victims, out of the presence of any defendant or co-conspirator, as bearing upon the victims' state of mind. In *Nick v. United States*, *supra*, at pages 670-673, the Eighth Circuit held that admission into evidence of several conversations between victims, out of the presence of any defendant or co-conspirator, was proper, because they had a bearing upon the element of fear. This evidence even included a conversation in which a victim had compared his predicament with a previous occasion (not involved in the *Nick* case) on which he had been victimized by an extortionist. All of this was properly admitted because, "the gist of the unlawful act is extortion," and "extortion involves a state of mind as an element of the offense. . . ."

Nick v. United States, *supra*, at p. 671.

Consequently, the court held that the victim's previous experience in an extortion situation was relevant to his state of mind during the commission of acts perpetrated by the defendants and, when limited to that purpose,⁸ it was properly before the jury. (It is interesting to note that in the *Nick* case "reputation" testimony from the victims, concerning persons connected with the defendants' labor union, was admitted into evidence, but the Eighth Circuit did not consider this issue on the merits.)

Id. at p. 670.

⁸Such a limitation was imposed by the district court in the instant case. See discussion below and 6 R.T. 722-724.

In evaluating the conduct of an extortionist, it “is not so much the cause of the victim’s fear, as it is whether or not defendants played upon that fear, in other words, made use of that fear. . . .”

Callanan v. United States, 223 F. 2d 171, 174 (8 Cir. 1955), *cert. den.*, 350 U.S. 862 (1955);

People v. Dioguardi, supra, 168 N. E. 2d at p. 689.

In *Dioguardi*, the New York Court of Appeals pointed out that:

“It is not essential that a defendant *create* the fear existing in the mind of his prospective victim so long as he succeeds in persuading him that he possesses the power to remove or continue its cause, and instills a new fear by threatening to misuse that power.”⁹

Id. at p. 689;

Cf. United States v. Varlack, 225 F. 2d 665, 668 (2 Cir. 1955).

In the instant case, the appellants Sica and Dragna joined the conspiracy to play upon pre-existing fears of Leonard and Nesseth—fears which had already been communicated by Leonard on three occasions and by Nesseth on one occasion, to a member of the conspiracy, Truman K. Gibson, Jr. Thus, when Sica and Dragna appeared upon the scene, the jury could and did properly “infer that the accused expected to play upon precisely

⁹New York’s statutory definition of extortion is the model for the Hobbs Act. *United States v. Nedley*, 255 F. 2d 350, 355 (3 Cir. 1958).

such fears," to wit, that these were Carbo's underworld enforcers, his friends on the West Coast.

See:

United States v. Compagna, supra, at p. 529;
Bianchi v. United States, supra, at p. 192.

The mere presence of Sica and Dragna constituted the illicit persuasion or threat much more dramatically than anything they could have said. The evidence established that their sole concern was to relieve the frustration of Gibson, Carbo and Palermo and to obtain for their confederates the object of their criminal demands. The record demonstrates, as Leonard and Nesseth testified, that Sica and Dragna had no lawful connection with the boxing business. Their appearance on the scene in May of 1959, could only have been calculated to create in the victims' minds an impression that was expressed in the terms which Leonard and Nesseth used at trial, to wit, that they were confronted by *underworld figures*, and, in Sica's case, *a strong-arm man*. This was why Leonard and Nesseth became terrorized. It explains their fear and Nesseth's sudden decision to go to the police when he saw appellant Dragna enter Leonard's office with Palermo at the Hollywood Legion Stadium. As the court in *People v. Dioguardi, supra*, pointed out, it is important to consider whether a defendant has "succeed[ed] in persuading him [the victim] that he possesses the power to remove or continue its cause, and instills a new fear by threatening to misuse that power", in order to carry out the threats of his co-conspirators.

“No precise words are needed to convey a threat. It may be done by innuendo or suggestion . . . and the relationships of the parties may be considered . . .”

as well as all the circumstances.

People v. Dioguardi, supra, 168 N. E. 2d at p. 689.

Michelson v. United States, 335 U. S. 469 (1948), is heavily relied upon by appellants as authority for their contention that the testimony of Nesseth and Leonard concerning the underworld reputations of Sica and Dragna constituted reversible error. That there is no remote connection between the issues in *Michelson* and the issues in the instant case is demonstrated by pointing out that *Michelson* was charged with bribery of a Government official and the alleged error in that case occurred during cross-examination of the defendant's character witnesses respecting rumors of *Michelson's* prior arrest, approximately twenty-seven years before the trial of that case. The district judge, of course, limited the purpose for which the evidence was received and the Supreme Court, *per* Mr. Justice Jackson, affirmed. The Supreme Court restated a proposition of long standing, both acknowledged and respected by the Government in the instant case, that the prosecution may not prove a defendant's guilt *by showing his propensity or disposition to commit crimes*. The case at bar has nothing whatsoever to do with this well-recognized principle of law and no effort was made by the prosecution to prove the *bad character* of any appellant. The important application of *Michelson* to the instant case is its implicit holding that proof of reputation is proper when it is relevant to an element of the crime charged.

In the course of the *Michelson* opinion, the Supreme Court acknowledged that existing rules relating to proof of character and reputation are anomalous [*id.* at p. 476] and have many exceptions [*id.* at pp. 475-476, fn. 8.]

Moreover, the existing rule was not applicable in English common law and it is not now the rule in some civil law countries. [*id.*, p. 475, fn. 7.] *Corpus Juris Secundum* characterizes the rules regulating proof of character as “illogical, unscientific and anomalous.” [*Id.* at p. 475, fn. 5.]

Witkin asserts, in his discussion of the proof of prior bad acts of a defendant, that such proof, frequently admissible during the prosecution’s case-in-chief, is classified as an exception to the general rule of proof of character. He suggests that “the true rule could be more realistically stated in affirmative form: *That evidence of other crimes is admissible whenever it is relevant to a material issue, and that it should be excluded only where its sole purpose and effect is to show the defendant’s bad moral character (disposition to commit crime).*” [Emphasis supplied.]

Witkin, *California Evidence*, Sec. 136, pp. 158-159.

Witkin’s point strikes right at the heart of the whole character and reputation problem. In *Michelson*, the Supreme Court rejected a suggestion that it formulate a new rule in this area of the law. The Court noted the efforts of “those dedicated to law reform” who have dealt with the subject and cited in a footnote the American Law Institute’s Model Code of Evidence comment to Rule 304 which explains that:

“Character, wherever used in these rules, means disposition not reputation. It denotes what a person is, not what he is reputed to be. No rules are laid down as to proof of reputation, when reputation is a fact to be proved. *When reputation is a material matter, it is provable in the same manner as is any other disputed fact.*” [335 U. S. at p. 486, fn. 23. Emphasis supplied.]

A close reading of *Michelson* compels the conclusion that the opinion deals with impeachment of good character testimony and nothing else, and that *character* means “disposition”, whereas, the instant case is concerned, in a very limited and judicially restricted fashion, with *reputation* which, under the facts of this case, is “a material matter . . . provable in the same manner as is any other disputed fact.”

A.L.I., *Model Code of Evidence*, Comment to Rule 304;

Hale, *Some Comments on Character Evidence and Related Topics*, 22 So. Cal. L. Rev. 341, 344-345 (1949).

It does not advance the proper analysis of this problem to dwell, as appellants suggest we should, upon a particular principle of law which, on the facts before the Court, is immaterial to the issue. Long ago, Wigmore recognized, as appellate courts repeatedly acknowledge, that general principles considered in a vacuum do not decide specific cases. The “multiple admissibility doctrine” implicitly recognizes this truth:

“When an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not

inadmissible because it does not satisfy the rules applicable to it in some other capacity, and because the jury might improperly consider it in the latter capacity. This doctrine, although involving certain risks, is indispensable as a practical rule.”

1 Wigmore, *Evidence* (3rd Ed. 1940), Section 13, p. 300.

In *State v. Belisle*, 79 N. H. 444, 111 Atl. 316 (1920), the New Hampshire Supreme Court was confronted with an evidentiary situation similar to that in the instant case and the court implicitly followed the “multiple admissibility doctrine”. An assault victim was allowed to testify, over objection, that the defendant was a man (or kind of man) who he, the victim, thought would use force (thereby justifying the victim’s use of a gun: he was a special police officer). The defendant objected on the ground that this evidence tended to prove that he had a “disposition” or propensity to commit assaults and it was therefore inadmissible. The court disagreed:

“The defendant has argued the case here as though the evidence was ruled in and used as proof that Lyman assaulted Fox. It is undoubtedly true that at least a part of it was inadmissible for that purpose. The argument that the disposition, character, and reputation of Lyman are not evidence that he assaulted Fox is sound. The difficulty with the defendant’s case is that, while the evidence was not admissible for that purpose, it was clearly admissible to prove the reasonableness of the mode of defense from threatened attack adopted by Fox. *As the evidence was admissible*

for some purpose, a general exception to it was unavailing." [Emphasis supplied.]

Id., at p. 317, 111 Atl.

The district judge's deft handling of the evidentiary problem in the instant case manifests the application of "settled principles of . . . evidence to unprecedented facts."¹⁰

Although courts frequently talk in terms of weighing the prejudicial effect of evidence against its probative value, it is helpful to remember that most of the prosecution's evidence in any case is *prejudicial* and it is offered *against* the particular defendant or defendants. Judge Hand said in *Compagna*:

" . . . Next, the testimony as to what Kaufman said at a public meeting held after Bioff's doings began to be bruited, was susceptible of being understood as a threat against any present who should testify against him. It was competent under the plainest principles, and its admissibility did not depend upon its truth. *If it 'prejudiced' Kaufman, that was precisely its entirely laudable purpose.* . . ." [Emphasis supplied.]

United States v. Compagna, supra, at p. 530.

Whether or not the evidence should be excluded depends upon the issues framed in a particular case by the indictment and the plea of not guilty. Consideration of the evidence *without reference to the pleadings* makes

¹⁰Language used by a California District Court of Appeal in discussing a novel fact situation and evidentiary problems arising therefrom. *People v. Scott*, 176 Cal. App. 2d 458, 492; 1 Cal. Rptr. 600 (1959), Pet. for Rehearing denied by Cal. Supreme Court.

it impossible to weigh the probative value thereof against its prejudicial effect.

The Supreme Court acknowledged in *Michelson* that the risks of “confusion of issues” and “unfair surprise” must be considered along with “undue prejudice” in determining admissibility of *character* evidence against the accused.

Michelson v. United States, supra, at p. 476.

It cannot be contended seriously by Sica and Dragna (and it is only to these appellants that this assignment of error should be considered) that they were subjected to either “confusion of issues” or “unfair surprise”. The indictment against them was returned on September 22, 1959. Thereafter they were aware of the charge contained in paragraphs 3c of Counts One and Five that:

“It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators’ demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators’ said demands.” [I C.T. 2, 9.]

The trial did not commence until seventeen months later and, by that time, Sica and Dragna were well insulated from either surprise or confusion, since long prior to trial, pursuant to Judge Tolin’s order, appellee made a formal written offer of proof concerning this matter. [II C.T. 308-309, 356-366.] More-

over, Judge Tolin's limiting instruction avoided any possible confusion of issues:

"Now, members of the jury, all of this little flurry comes about I think because lawyers are creatures of habit. We got pressed into formal molds and being aware of formal rules are inclined to be upset and think something is improper if it be within that strict classicism, but the situation here is one in which if you were dealing with literature or music you would say to let the classical period come into the romantic a little bit. It doesn't mean that you have total freedom but there is an old basic principle in American law respecting the trial of criminal cases, and that is that the reputation of a defendant is just not the thing in issue, you are trying a specific charge or a specific group of charges that are set forth in the indictment.

"Now, a person who is, generally speaking, a fine upstanding citizen might occasionally go out and commit an occasional crime, and a man who has a bad reputation might never commit one. He might not deserve the reputation, because reputation is something different from character. Character is the quality of person you are and reputation is what is believed in certain quarters regarding certain aspects of your life. It might be justified. It might not.

"So it would be very easy, unless the jury disciplines itself to consider the evidence for the purpose for which it is admitted, to get off on the track of whether or not a particular defendant has a reputation of a certain kind or other.

“Now, it is contended here by the Government that this witness Leonard was put in fear of Mr. Sica and I think they are entitled to show or have Mr. Leonard tell why he was afraid, and it is for you to judge if he was afraid and to look at the situation to see if it was one which was reasonably calculated to produce that fear. But the reputation of Mr. Sica per se is not before you, except in this limited way.” [6 R.T. 722-724. See also: 13 R.T. 1865, and the court’s instructions on the subject incorporated in its charge to the jury: 50 R.T. 7698-7699, 7706.]

The testimony of Leonard and Nesseth with respect to the reputations of Sica and Dragna was:

(1) Material and relevant *direct evidence* concerning the state of mind of the extortion victims. (Consequently, it was a fact to be proved in that it explained why confrontation by these *particular* persons induced fear. It not only explained fear but related to the reasonableness thereof.)

(2) Material and relevant circumstantial evidence respecting the knowledge and intent of all the appellants including Sica and Dragna. (Was it a part of the conspiracy to use the reputations of Sica and Dragna as a weapon to induce fear in the victims; were Sica and Dragna aware of this; and did they knowingly participate in the execution of such a scheme?)

“ . . . It was relevant to show that the scheme proved successful as part of the proof that there had been a scheme at all. . . . There is a rational connection between the existence of the criminal agreement . . . and the fact that the acts

upon which the conspirators agreed, when carried out, had the expected effect upon those against whom they were directed. . . .”

United States v. Compagna, supra, at p. 528.

(The view of Swan and Clark, JJ., concerning this evidentiary question.)

Surely, it cannot be seriously contended that the Government is proscribed, in a proper case, from proving that defendants used evil repute as a weapon in the commission of extortion, and that they succeeded in their objective by striking terror in the hearts of their victims. As counsel for appellant Sica argued to the district court in the course of his pre-trial motion to dismiss:

“In a very literal sense Joseph Sica, because of his alleged reputation and underworld connections, is alleged to be a deadly weapon.” [II C.T. 330.]

Judge Hand said in *Compagna*:

“. . . If a bully begins a negotiation by laying a firearm on the table, it is not relevant merely as to such negotiations with another person. But if later negotiations with the same person come in question and the issue includes the motives which actuated that person, it is highly relevant to show how the acquaintance began. That is too obvious to deserve elaboration.”

United States v. Compagna, supra, at p. 530.

In the instant case, Sica and Dragna served their co-conspirators like *firearms* on the negotiating table.

Although the reputation testimony was clearly relevant to two elements of the crimes charged, fear and

intent, the prosecution was allowed very little latitude in proving this aspect of the case. Even though Leonard and Nesseth were prepared to testify in detail concerning what they knew about Sica and Dragna prior to May of 1959, they were limited to a characterization of Sica as “an underworld figure and strong-arm man” and of Dragna as “an underworld figure.” For obvious reasons, the defense never questioned the accuracy of these conservative characterizations, either at the bench or in open court.¹¹ [See Exs. 135 for Ident., 137 for Ident. to 142 for Ident.]

The basic fact is that the conspirators selected two men whose names were well known in the Los Angeles community, particularly well known to persons in the victims’ strata of society. The fact that appellee was prepared to offer independent corroborating proof of the reputations of Sica and Dragna is reflected in colloquy at the bench out of the presence of the jury and in Government’s Exhibit 135 for Ident., and 137 for Ident. through 142 for Ident.

Based upon Sica’s record of violence and his criminal activities, the characterization of him as a “strong-arm man” is a conservative summary of more than ten years as a vicious underworld enforcer. [See Government’s Opposition to Sica’s Motion for Bail Pending Appeal filed in this Court on December 12, 1961.] It is difficult to see how appellee could have met its burden of

¹¹The activities of Sica as a Los Angeles underworld enforcer are revealed by official arrest reports marked for identification and they are summarized at pages 20-23 of Appellee’s Opposition to Motions of Appellants Carbo and Sica for Bail Pending Appeal filed in this Court on December 12, 1961; see also remarks of counsel for appellant Dragna concerning his client. [6 R.T. 710.]

proof in the instant case without going at least as far as it did. Appellee would have been left in a position suggested by trial counsel for appellant Dragna during colloquy at the bench when he said:

“I don’t know what the solution is, so far as the Government is concerned. I think it is just a situation where they have taken on something that they cannot prove under the laws of the United States in a court of law. It is just impossible to do it.”
[6 R.T. 711.]

Counsel’s contention to Judge Tolin was answered by Charles Dickens when he wrote:

“‘If the law supposes ‘that’; said Mr. Bumble, . . . ‘the law is a ass, a idiot.’”

Dickens, *Oliver Twist*, Chapt. 51.

Much has been written upon the subject of admitting evidence which adversely reflects upon the character and reputation of an accused before he puts these matters in issue. In a recent well-reasoned opinion, the Supreme Court of California discussed a situation in which prejudicial testimony concerning “unspecified past misconduct” was admitted against a defendant charged with a sexual offense against a seven-year old girl. While acknowledging that evidence in this type of case is particularly inflammatory and that such evidence must be carefully scrutinized, still the court could find “no abuse of discretion in the determination that the probative value of [the] testimony . . . exceeded its prejudicial effect. [Citations omitted.] *That the jury might, from such testimony, infer facts which the People could not have proved directly, is a risk of*

the sort which must be and is borne in the trial of many cases. . . .” [Emphasis supplied.]

People v. Burton, 55 Cal. 2d 328, 347, 349-350, 359 P. 2d 433, 441, 443 (1961).

In the *Burton* case, the defense argued, and it is argued here, that testimony of this sort requires the defendant to either “sit silent” or “he can explain. . . . The minute he does that, that opens the door for all this other [evidence] to come in and [he] hang[s] himself.”

Id. at 55 Cal. 2d 350, 359 P. 2d 443.

Yet, this argument led the court to reaffirm that “this is a risk of the sort which must be and is borne in the trial of many cases.” [*Id.*] And, indeed it is, in *any* case where a defendant, confronted with incriminating facts and circumstances, declines to explain them away because of an inability to do so, particularly when, having taken the stand, he ignores such incriminating matters in his testimony.

Caminetti v. United States, 242 U. S. 470, 492-495 (1917).

Mr. Justice Frankfurter, in his concurring opinion in *Michelson v. United States*, *supra*, at pages 487-488, read the opinion of the Court as having left discretion with the district courts in the matter of excluding evidence.

“I do so [concur] because I believe it to be unprofitable, on balance, for appellate courts to formulate rigid rules for the exclusion of evidence in courts of law that outside them would not be regarded as clearly irrelevant in the determination

of issues. . . . To leave the District Courts of the United States the discretion given to them by this decision presupposes a standard of professional competence, good sense, fairness and courage on the part of the federal district judges. If the United States District Courts are not manned by judges of such qualities, appellate review, no matter how stringent, can do very little to make up for the lack of them.”

Of course, in the instant case the district judge exhibited the qualities referred to by Mr. Justice Frankfurter and, as has been noted above, the testimony allowed was not only the subject of an offer of proof and colloquy at the bench during trial, but was considered with deliberation through a pre-trial offer of proof submitted by appellee. [1 C.T. 356-366; 6 R.T. 705-717.]

Thereafter, very little was made of the reputation evidence by appellee, and in final argument, the subject was cautiously and, we submit, fairly dealt with by the prosecutor. [47 R.T. 6989-6991. See also the court’s charge to the jury, 50 R.T. 7695-7699, 7705-7708, reproduced in Appendix E, below.]

As the Supreme Court of California pointed out in *People v. Burton*, *supra*, 55 Cal. 2d at page 348: “The matter is largely one of discretion on the part of the trial judge.” The defendant should be protected from this type of evidence where it lacks relevance to any material issue other than propensity or disposition to commit crime. He “*is entitled to such protection against its misuse as can reasonably be given him without impairing the ability of the other party to prove his*

case, or depriving him of the use of competent evidence reasonably necessary for that purpose.” [Emphasis supplied.]

Id. at p. 349.

In the *Burton* case, the Supreme Court of California was impressed with the showing that the trial judge had indeed exercised discretion and had enforced certain ground rules upon receipt of the evidence:

“In the instant case, as shown by colloquies outside the presence of the jury, the trial judge and prosecuting attorney were aware of the . . . problems and heeded the . . . admonitions [of the Supreme Court of California]. . . .”

Id. at 55 Cal. 2d 349, 359 P. 2d 442.

In order to fully appreciate the essential nature of Leonard’s and Nesseth’s testimony on this subject, it is important to recall the chronology of events prior to the advent of Sica and Dragna upon the scene:

January 27, 1959: Carbo threatens Leonard’s life and warns that he, Carbo, has friends on the West Coast who can enforce his demands.

April 28, 1959: Carbo threatens to have Leonard and Nesseth killed and reminds Leonard that he has friends on the West Coast who will do this. Leonard is so frightened by this that he vomits.

Within one week after this conversation of April 28th, the following occurs:

April 30, 1959: Palermo arrives in Chicago and stays at the Bismarck Hotel (owned by Norris and Wirtz) at I.B.C. expense.

May 1, 1959: Palermo meets with Gibson in the lobby of the Bismarck Hotel and thereafter leaves the hotel for Los Angeles, neglecting to check out.

May 1, 1959: Palermo arrives in Los Angeles and registers at the Beverly Hilton Hotel under the alias of "George Tobias".

May 1, 1959: Palermo meets with appellant Dragna at Puccini's Restaurant in Beverly Hills.

May 2 or 3, 1959: Leonard is summoned to the Beverly Hilton Hotel by Palermo where he is taken to Palermo's room and, in the presence of Palermo, threatened by Sica.

May 4, 1959: Dragna and Palermo appear in Leonard's office at the Hollywood Legion Stadium. Nesseth walks out and goes to the police when he sees Dragna.

May 5, 1959: Sica and Palermo endeavor to get Leonard to meet them at Perino's Restaurant in Los Angeles.

May 6, 1959: Sica and Palermo appear in Leonard's office at the Hollywood Legion Stadium.

In the light of these events and the *selection of weapons* by appellants, not by the Government, it would not have been in the interest of justice to foreclose appellee from its proof.

Appellants Sica and Dragna were protected, however, by the extreme caution of the district judge who would not allow appellee, even on cross-examination of Sica and Dragna, to inquire about similar bad acts of these

appellants which should have been allowed under the authority of *Nick v. United States*, *supra*; *United States v. Varlack*, *supra*; *Bush v. United States*, 267 F. 2d 483 (9 Cir. 1959); and other cases.

“When an act is equivocal in its nature and may be criminal or honest according to the intent with which it was done, then other acts of the defendant, and his conduct on other occasions, may be shown in order to disclose the mastering purpose of the alleged criminal act.”

Bush v. United States, *supra*, at p. 489.

See also:

Lawrence v. United States, 162 F. 2d 156 (9 Cir. 1947);

Tedesco v. United States, 118 F. 2d 737 (9 Cir. 1941);

1 Wharton, *Crim. Evidence*, Section 237, pages 523-524 (12 Ed. 1955).

The trial court was confronted, and now this Court is faced, with the fundamental question of whether extortion committed in the manner of this case can escape prosecution. If so, then it follows that the worse the reputation of the enforcer, the less explicit his threats need be; and, if evidence of these facts is excluded, the extortionist with the most effective weapon (enforcers with reputations like Sica's and Dragna's) will escape punishment. It is this type of spurious reasoning which led the Supreme Court of Illinois to assert, with reference to the “prior bad acts rule” that “The party cannot

by multiplying his crimes diminish the volume of competent testimony against him.”

People v. Cione, 293 Ill. 321, 127 N. E. 646, 650 (1920).

In 1938, professor Julius Stone published an article in the Harvard Law Review which canvassed the American cases on the “other crimes rule”. He found that the law is often assumed to be otherwise than as stated in this rule, and that historically:

“American states then began with a rule of exclusion which was, like the English rule, a compromise between two extreme possibilities: on the one hand that other acts, because they cast light on propensities and thence on the issues, may always be fully explored; on the other hand that other acts must be absolutely excluded because of the prejudice, confusion, and surprise their use would create. The common law accepted neither extreme. It rejected the former; it only adopted the latter subject to the all-important reservation that if the other acts were relevant to guilt of the crime charged otherwise than merely through propensity, then those acts might like any other relevant facts be explored.”

Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988, 1033-1034 (1938).

See also:

Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv. L. Rev. 954 (1933).

Obviously, this is another way of stating the crucial question referred to in the footnote in *Michelson, supra*, which cites the American Law Institute's Model Code of Evidence: Is this evidence relevant to any issue other than propensity to commit crimes?

The analogy of the "other crimes rule" to appellee's position in the instant case is persuasive. It presents a situation in which the courts are willing to allow the prosecution to offer "prejudicial" evidence against the defendant during its case-in-chief, evidence probably more inflammatory with the lay jury than testimony reporting the defendant's crystallized image in society as a racketeer. Such reputation evidence is certainly admitted on as sound grounds, herein, as the "rumors" of a twenty-seven year old arrest permitted in *Michelson, supra*.

The fact that a jury is called upon to compartmentalize evidence is no reason to exclude it. They are asked to do many difficult things, up to and including excluding from their minds prejudicial evidence which has been stricken from the record. This is characteristic of the jury system.

In *United States v. Rosenberg*, 195 F. 2d 583 (2 Cir. 1952), *reh. den.* 195 F. 2d 609, *cert. den.* 344 U. S. 838, *reh. den.* 344 U. S. 889, *reh. den.* 347 U. S. 1021, *motion den.* 355 U. S. 860, the Second Circuit was confronted with a situation in which the word "Communist" was frequently bandied about during the course of the trial, and at least one of the witnesses, Elizabeth Bentley, was allowed to testify with respect to the nature of communism and the danger it represented to the United States. The Second Circuit, speaking through Judge Jerome Frank, held in this capital case:

“ . . . Whether and how much of that kind of evidence should come into a trial like this, is a matter for carefully exercised judicial discretion. We think the trial judge here did not abuse that discretion . . . the judge cautioned the jurors ‘not to determine the guilt or innocence of a defendant on whether or not he is a Communist.’ It may be that such warnings are no more than an empty ritual without any practical effect on the jurors. [Citation omitted] *If so, this danger is one of the risks run in a trial by jury; and the defendants made no effort to procure a trial by a judge alone, under Criminal Rule 23(a).*” [Emphasis supplied.]

United States v. Rosenberg, supra, at p. 596.

2. The Indictment Is Not Defective for Vagueness, Unintelligibility, nor Insufficient Allegations of Federal Jurisdiction.

Three appellants have made an assortment of assertions about alleged inadequacies of the indictment. Gibson contends that Counts One and Five are vague. [Gibson’s Op. Br. 26-28.] Dragna says that Count Five is unintelligible to him. [Dragna’s Op. Br. 33-34.] Gibson urges that Count One does not allege an effect upon interstate commerce. [Gibson’s Op. Br. 23-26.] Finally, Palermo has decided, after filing his Opening Brief, that it was time to contend, for the first time, that *all counts of the indictment* do not belong in a federal court, apparently because they have something to do with crimes involving boxing. Palermo’s shotgun blast at the indictment will be treated under this argument heading, for want of a better place to discuss it.

Since Palermo has not seen fit to comply with this Court's Rule 18(2)(c), it is difficult to determine the alleged errors of the district court of which he complains. [Palermo's Supp. Op. Br. 24-35.]

(a) *Counts One and Five Are Not Vague.*

Counts One and Five of the indictment each are conspiracies to commit certain offenses against the United States. Count One alleges that the objects of the conspiracy charged therein were the commission of offenses, to wit:

“ . . . Willfully to obstruct, delay and affect interstate commerce by means of extortion, in violation of United States Code Title 18, Section 1951.”
[I C.T. 2.]

Count Five alleges that the objects of the conspiracy charged therein were the commission of offenses, to wit:

“ . . . Willfully and with intent to extort money and a thing of value, to wit, a share of the management of the prize fighter Don Jordan, from Leonard Blakely and Donald Paul Nesseth, to transmit in interstate commerce communications containing threats to injure the persons of Donald Paul Nesseth and Leonard Blakely in violation of Title 18, United States Code, Sections 371 and 875(b).” [I C.T. 9.]

Both Counts One and Five then proceed to allege, in considerable detail, the means by which the conspirators planned to accomplish the foregoing objects. [Count One: Paragraphs 3(a), 3(b), 3(c), and 3(d)—I C.T. 2-4; Count Five: Paragraphs 3(a), 3(b), 3(c), and

3(d)—I C.T. 9-10.] Count One concludes with the allegation of 21 overt acts in furtherance of the conspiracy. [I C.T. 4-5.] Count Five alleges 5 telephone conversations between Palermo and Carbo, and Leonard, as overt acts in furtherance of the conspiracy charged. [I C.T. 10-11.]

Both conspiracy counts charge the offenses in terms of the statutes alleged to be violated. They would be sufficient even if they failed to allege all of the elements of the substantive offenses which are the alleged objects of the conspiracies:

“ . . . It is well settled that in an indictment for conspiring to commit an offense—in which conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, . . . or to state such object with the detail which would be required in an indictment for committing the substantive offense. . . . In charging such a conspiracy ‘certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary.’ . . .”

Wong Tai v. United States, 273 U. S. 77, 81 (1927).

There can be no doubt as to the offenses which Counts One and Five allege the appellants conspired to violate. Gibson does not contend to the contrary. He complains that the allegations of the means by which the criminal objects were to be effectuated are unclear. We submit that paragraph 3 in each of the conspiracy counts clearly alleges the scheme for ac-

complishing the criminal objects of the conspiracies. The gist of Gibson's argument is that the indictment does not plead the evidentiary detail which would prove the offenses.

This Court has answered such a contention on many occasions:

"This indictment gives the gist of the offense of conspiracy, the agreement to commit an unlawful act and the means by which that agreement was to be achieved. . . . 'The particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of the conspiracy for which [appellants] contend is not essential to an indictment.' *Glasser v. United States*, 315 U. S. 60, 66. . . ."

Schino v. United States, 209 F. 2d 67, 69 (9 Cir. 1954), *cert. den.* 347 U. S. 937 (1954).

See also:

Medrano v. United States, 285 F. 2d 23, 26 (9 Cir. 1961), *cert. den.* 366 U. S. 968 (1961);

Hopper v. United States, 142 F. 2d 181, 184 (9 Cir. 1944) (En Banc);

United States v. Polakoff, 112 F. 2d 888, 890 (2 Cir. 1940), *cert. den.* 311 U. S. 653;

Rule 7(c), F. R. Crim. P.

In *Polakoff*, Judge Learned Hand held:

" . . . The indictment merely alleged that the accused conspired 'to influence and impede the official actions of officers in and of the United States District Court * * * in order that said Sidney Kafton would receive a sentence of not

more than one year and one day'. The challenge is that it should have specified who were the 'officers' that were to be so 'impeded'. We do not see why, if the accused were really in ignorance of this detail, they could not have been fully protected by a bill of particulars. . . ."

United States v. Polakoff, supra, at p. 890.

Counts One and Five clearly allege the elements of the conspiracy, the elements of the offenses which are the objects thereof, and the role each of the five appellants was to play in their attainment.

(b) *Count Five Is Intelligent.*

Dragna advances an interesting theory, based upon neither reason nor authority, that a conspiracy indictment must allege overt acts which post-date the entry into the conspiracy of every member thereof; otherwise, he urges, the count is *unintelligible*. The general conspiracy statute does not specify when, with relation to the formation and termination of a conspiracy, an overt act in furtherance of the object of the conspiracy must occur. It simply requires that:

"[O]ne or more of such persons [the conspirators] do any act to effect the object of the conspiracy. . . ."

18 U. S. C. §371;

Bannon v. United States, 156 U. S. 464, 468-469 (1895).

The conspiracy may close the next instant or it may continue in existence for a century. Only one overt act need be pleaded and proved. Count Five alleges *five overt acts*. All five were proved at trial beyond a

reasonable doubt. Many other overt acts in furtherance of the criminal objects charged in Count Five were also established at the trial. They were not pleaded in the indictment because it was not necessary to do so under §371. One of those overt acts which were proved but not pleaded was a threatening call from Palermo to Leonard in August, 1959, more than three months after Dragna was shown to have been active in the conspiracy. This call was calculated to dissuade Leonard from testifying against the conspirators, and it occurred during the period of the conspiracy as alleged in Count Five. [6 R.T. 765.]

This call is not essential in order to answer Dragna's contention. However, it illustrates the illogic of his argument. The fact that Carbo made no threatening calls to Leonard after April 28, 1959, does not mean the conspiracy charged in Count Five terminated on that date. The role of Dragna and Sica which is charged in paragraph 3(c) of Count Five was to put force and content into Carbo's telephonic threats. Thus, their parts in the conspiracy were as necessary to the accomplishment of the scheme as the telephone calls which warned Leonard that Carbo had "friends on the West Coast". The evidence revealed threats in behalf of the conspirators long after the return of the indictment.

Cf. McDonald v. United States, 89 F. 2d 128, 133-134 (8 Cir. 1937).

Furthermore, even if paragraph 3(c) were surplusage in Count Five, this allegation is clearly essential in Count One. Since the proof in support of the identical paragraph in Count One was congruent with the proof

of the same allegation in Count Five, no prejudice could have resulted to Dragna from its presence in Count Five.

Finally, Dragna has not shown in his Opening Brief that he even preserved this argument by urging this ground below in support of a motion to strike paragraph 3(c) of Count Five.

(c) *Count One Alleges Facts Showing More Than the Minimal Effect Upon Interstate Commerce Which Suffices Under the Hobbs Act.*

Gibson's argument in support of his contention that Count One does not satisfy the interstate commerce element of the Hobbs Act seems to be an argument in support of a motion for reconsideration by the Supreme Court of its decision in *United States v. International Boxing Club*, 348 U. S. 236 (1955). It does not treat the test of the anti-racketeering statute which provides in pertinent part:

" . . . Whoever *in any way or degree* obstructs, delays, or *affects* commerce . . . by extortion or attempts or conspires so to do . . . shall [be guilty of a felony]." [Emphasis supplied.]

18 U. S. C. §1951.

In his brief, Gibson is really talking about the quantum of effect upon commerce necessary to invoke the Sherman Antitrust Act. 15 U. S. C. §1 *et seq.* The test is quite different for the offense charged in Count One:

"It seems apparent from the language of the statute that it was the intent of Congress to protect interstate commerce against extortion *which in*

any way or in any degree reasonably could be regarded as affecting such commerce. The exaction from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment and supplies, or who are engaged in constructing facilities to serve such commerce is, in our opinion, proscribed by the statute in suit.” [Emphasis supplied.]

Hulahan v. United States, 214 F. 2d 441, 445 (8 Cir. 1954).

See also:

Anderson v. United States, 262 F. 2d 764, 769-770 (8 Cir. 1959), *cert. den.* 361 U. S. 855 (1959);

United States v. Varlack, 225 F. 2d 665, 669-670 (2 Cir. 1955).

Judge Walsh, in the Southern District of New York, demonstrated the fallacy of Gibson’s argument:

“ . . . Defendants also rely upon certain holdings with respect to the Sherman Anti-Trust Act, 15 U. S. C. A. §§1-7, requiring that an indictment allege particulars showing a direct and substantial effect upon interstate commerce. *United States v. French Bauer, Inc.*, D. C. S. D. Ohio, 48 F. Supp. 260, appeal dismissed 318 U. S. 795 . . .; *United States v. Starlite Drive-In, Inc.*, 7 Cir. 204 F. 2d 419. These cases are not in point. Whereas under that Act it may be that a court must find that the acts complained of have a direct and substantial effect on interstate commerce, under the subject statute there is no need for such a finding. The statute provides that effect in ‘any way or de-

gree' is sufficient. Congress itself has concluded that any effect upon interstate commerce in any degree caused by extortion or conspiracy contemplating extortion is in itself substantial. . . . Congress quite understandably might prohibit extortion or conspiracies based on extortion which affect interstate commerce in any degree. Their corrosive quality is not likely to be subject to quantitative measurement to the same extent as the economic effect of combinations in restraint of trade."

United States v. Malinsky, 19 F. R. D. 426, 428 (S. D. N. Y. 1956).

The allegations contained in paragraphs 3(a) and 3(d) of Count One clearly satisfy the requirements of the cited cases. [I C.T. 3-4.] The scheme of the conspiracy, as pleaded in these paragraphs, included:

"[T]hreats of physical harm and violence and threats of economic loss and injury to the victims [Nesseth and Leonard, in order] to obtain monies representing a share of the purses earned by a professional prize fighter *then engaged in championship matches being nationally televised . . . and to obtain control of the professional activities of the same* [professional prize fighter] *by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.*

* * * * *

" . . . It was an essential part of the conspiracy that defendant Truman Gibson, Jr., *who was an officer of the International Boxing Club,*

Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade [the] victims . . . to accede to the demands of the conspirators for control of the prize fighter. . . ." [I C.T. 3-4. Emphasis supplied.]

The italicized portions of these excerpts from Count One reveal a plan likely to have a substantial effect upon interstate commerce, if it succeeds. One of the foreseeable consequences of such a plan would be the sudden cancellation of a championship prize fight program scheduled for broadcast on television. This possibility alone is sufficient to invoke the Hobbs Act, forgetting the less dramatic effects that championship telecasts have upon interstate commerce, *e.g.*, interstate ticket sales, interstate contracts between boxers, interstate travel by the boxers, trainers, and managers, etc.

See:

United States v. International Boxing Club, supra, at pp. 245-248.

It is clear that the programming content of radio and television broadcasts are a matter of federal jurisdiction under the commerce power.

National Broadcasting Co. v. United States, 319 U. S. 190 (1943).

In fact, the content of television programs is a matter of *exclusive* federal jurisdiction under the commerce power.

Allen B. Dumont Laboratories v. Carroll, 184 F. 2d 153 (3 Cir. 1950), *cert. den.* 340 U. S. 929 (1951).

Thus the allegations of Count One, which were abundantly established at trial (as well as additional impacts on interstate and foreign commerce. See section on instructions on the commerce element, below, for such evidence) satisfy the Hobbs Act requirement that the object of the conspiracy is calculated to affect commerce in some way or degree.

(d) *The Jurisdiction of the Federal Courts to Punish Violators of the Hobbs Act Does Not Depend Upon the Occupations of the Victims of the Extortion Plot.*

Palermo devotes twelve pages of his Supplementary Opening Brief to the fantastic proposition that it is not a federal crime to conspire to commit extortion which affects interstate commerce, to attempt to commit such extortion, to commit such extortion, to conspire to transmit threatening communications in interstate commerce for the purpose of committing extortion, and to transmit such threatening communications—if the victims of each of these crimes are employed in some capacities in the professional prize fighting business. He invokes the Fifth and Tenth Amendments to the Constitution as his authority.

His arguments numbered II and III [Palermo's Supp. Op. Br. 24-32] are answered by the *Nick* case:

“ . . . That the Act is within the commerce clause seems clear under *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 604-606. . . . The *Fainblatt* case holds that manufacturers of articles entering into interstate commerce are within the commerce clause and subject to the National Labor Relations Act, 29 U. S. C. A.

§151 et seq. 'where the cessation of manufacture necessarily results in the cessation of the movement of the manufactured product in interstate commerce.' 306 U. S. page 604. . . . In that case the 'cessation of the movement of the manufactured product in interstate commerce' existed because if the clothing could not be manufactured it could not enter into interstate commerce. . . ."

Nick v. United States, 122 F. 2d 660, 668-669 (8 Cir. 1941), *cert. den.* 314 U. S. 687, *reh. den.* 314 U. S. 715, *reh. den.* 316 U. S. 710.

See also:

United States v. Varlack, 225 F. 2d 665, 672 (2 Cir. 1955);

Hulahan v. United States, 214 F. 2d 441, 445 (8 Cir. 1954).

Palermo suggests a truly novel conception in his argument number IV [Palermo's Supp. Op. Br. 32-33.] If his interpretation of the law were followed by the courts, they would be violating the concept of equal protection of the law implicit in the very Fifth Amendment due process of law clause upon which he relies. A distinction cannot be drawn between protecting victims of interstate telephonic threats who work in one industry and those who work in another. Yet this is his suggestion. A legislature may not make such an invidious distinction between classes which will be protected by the law and classes which shall be unprotected.

Cf. Morey v. Doud, 354 U. S. 457 (1957).

The effect of adopting Palermo's contention would be to invite racketeers to concentrate their "shake-down"

activities on the professional prize fight business and every other business “which is not commerce”. This would give racketeers a license to steal, since extortion threats could be transmitted with impunity from one State to another State to victims in these industries against which Palermo says the Constitution discriminates. This is nonsense. Palermo has confused *commerce* in its economic meaning with commerce as a term of art for interstate and foreign communication and transportation, which is its usage in §875(b).

Palermo’s argument numbered V [Palermo’s Supp. Op. Br. 33-35] appears to confuse Counts One and Five. Both charge conspiracies, but the objects of each are different, and the statutes under which they are brought are different. His contention that the conspiracy and substantive offenses proscribed by 18 U. S. C. §1951 merge is simply not the law.

Callanan v. United States, 364 U. S. 587 (1961).

In conclusion, all errors raised by Palermo under his arguments numbered II, III, IV, and V, should not be considered by this Court *de novo*, because they were never raised in the district court.

3. Motions to Dismiss the Indictment for Alleged Failure to Make Requisite Allegations of Venue Were Properly Denied.

Gibson asserts that the second conspiracy count in which he is charged, Count Five, does not allege venue to be in the Southern District of California with sufficient precision. [Gibson’s Op. Br. 29-32.] Carbo contends that Counts 7 and 9 should have been dismissed for lack of a venue allegation. [Carbo’s Op. Br. 66-68.]

(a) *No Statutory or Constitutional Venue
Rights Were Infringed.*

Appellants were guaranteed by the Constitution that they could be tried in “the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .”

Constitution, Sixth Amendment;

Constitution, Art. III, Sec. 2, Cl. 3.

This right was vindicated: the crimes charged in each of the ten counts in the indictment were proved to have occurred, in whole or in part, in the Central Division of the Southern District of California. Appellants do not contend otherwise.

18 U. S. C. §3237.

Nor were appellants kept in the dark as to appellee’s intention to offer evidence at the trial which would establish that the indictment was returned in a jurisdiction having the proper venue. In order to avoid any such misapprehension, a bill of particulars was filed on October 28, 1959, detailing the locations of all of the meetings and the termini of all the telephone calls which were the subject of the overt acts alleged in the two conspiracy counts (One and Five) and the five substantive counts charging threatening communications transmitted in interstate commerce (Six through Ten). [I C.T. 177-179.]

Counsel for Carbo suggests that the bill “was in error because it indicated that the calls were initiated in Los Angeles, and so it effectively prevented appellant from exercising his rights under §3239 [of Title 18, U. S. C.].” [Carbo’s Op. Br. 68.] This allegation is

erroneous in both fact and law. A reading of the bill of particulars will reveal that Carbo was informed thereby not where the transmission of threats was initiated and where the transmission terminated; but rather, he was notified that the evidence would show that the two geographical termini of the telephone calls were Los Angeles, California, and Philadelphia, Pennsylvania. [1 C.T. 179.]

It is immaterial how his counsel interpreted the bill on this point, however, since the Central Division of the Southern District of California was the proper venue for all ten counts of the indictment. If he had moved the court to transfer venue to the Eastern District of Pennsylvania pursuant to 18 U. S. C. §3239, his motion would have had to be denied. Carbo could invoke §3239 only with respect to Counts Seven and Nine if they were the only counts in the indictment, since these are the only counts charging him with violation of 18 U. S. C. §875(b). However, Counts One, Three, and Five charge Carbo under statutes which would invoke §3237 rather than §3239. The presence of Count Three in the indictment would have required the denial of a motion by Carbo to transfer venue to Philadelphia since it does not allege facts which are cognizable in that district. An indictment may not be broken into pieces in determining a motion for a change of venue.

United States v. Hughes Tool Co., 78 F. Supp. 409, 410 (D. Hawaii 1948).

Of course Gibson could not have invoked §3239 either, since he was not "indicted under [section] 875" despite the sophistic suggestions in his brief to the contrary. [Gibson's Op. Br. 29-30.] He fails to dis-

tinguish between a substantive offense, *e.g.*, transmitting a threatening communication in interstate commerce with the intent to commit extortion (for which he was *not* charged), with a conspiracy to commit that substantive offense (for which he *was* charged).

United States v. Rabinowich, 238 U. S. 78, 85-86 (1915).

Gibson's suggestion that the overt acts alleged in Count Five are defective, for failure to allege that Gibson committed one of them or that the telephone calls referred to in these overt acts were interstate communications, is baseless. [Gibson's Op. Br. 30.] It is obvious that 18 U. S. C. §371 does not require that the Government either plead or prove an overt act by *each* conspirator in order to convict him thereunder. One will suffice by the terms of the statute. It is equally obvious that the conspiracy charged in Count Five could have been pleaded and proved without a single overt act involving a telephone conversation. The indictment might have alleged that the overt acts were Gibson's meeting with Leonard, Nesselth, and McCoy at the Ambassador Hotel in Los Angeles on October 23, 1958, and Palermo's transmittal of the \$1,000 Western Union money order to Leonard in Los Angeles on December 23, 1958. [Exs. 59, 82.] If the overt acts in furtherance of a conspiracy to transmit threatening communications in interstate commerce need not be threatening communications, *a fortiori*, overt acts which are telephonic communications need not be alleged to be *interstate* communications.

Gibson also complains that he cannot discern from Count Five which of the overt acts occurred in Los

Angeles County and which occurred “in other places.” The obvious answer, of course, is that *each* overt act alleged in Count Five occurred “in Los Angeles County” and “in other places”, since each call was in fact an interstate call with one terminus in Los Angeles. The bill of particulars settled this matter conclusively. [I C.T. 178-179.]

(b) *Venue Is Not One of “The Essential Facts Constituting the Offense Charged” Which Must Be Alleged in the Indictment.*

Carbo contends that Counts Seven and Nine of the indictment should have been dismissed because they do not contain an allegation determining the venue of the trial. He cites one case whose *alternative holding* is that an indictment which failed to allege the district in which the crime was committed, when not followed by a bill of particulars supplying this information, was *demurrable*.

Bratton v. United States, 73 F. 2d 795 (10 Cir. 1934).

The *Bratton* case is not authority for this case for several reasons. The most important is that it antedates the promulgation of the Federal Rules of Criminal Procedure by twelve years. Another reason for doubting the authority of *Bratton* is that there is a strong and sufficient basis for the reversal to be found there in the other inadequacies of the indictment before that court, which is the first reason stated by the court for the reversal. Finally, there was a possibility of surprise to the defendant presented by the facts of *Bratton* which did not exist here. No bill of particu-

lars was ever given by the prosecution in *Bratton*; thus, the defendant was liable to surprise at trial when evidence of the locus of the crime was offered. Not so here, since the venue of the crimes charged in Counts Six and Nine was included in a bill of particulars filed about sixteen months before the trial began.

The Federal Rules of Criminal Procedure were promulgated to abolish the complexity of common law procedure which included the demurrer to the indictment referred to in *Bratton*:

“These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure *simplicity in procedure*, fairness in administration and the elimination of unjustifiable expense and delay.” [Emphasis supplied.]

Rule 2, F. R. Crim. P.

While formal defects in an indictment might jeopardize it when challenged by a demurrer, at common law, indictments are no longer to be scrutinized with the eye of a nineteenth century pleader in order to pass the test of sufficiency. The test of a sufficient criminal charge is set forth in the Rules as follows:

“The indictment or the information shall be a plain, concise and definite written statement of the *essential facts constituting the offense charged*. . . . It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. . . .” [Emphasis supplied.]

Rule 7(c), F. R. Crim. P.

The same rule provides for the filing of a bill of particulars when cause is shown therefor to the court.

Rule 7(f), F. R. Crim. P.

Demurrers and motions to quash were abolished by the promulgation of the Rules.

Rule 12(a), F. R. Crim. P.

The effect of the creation of the foregoing rules was to invalidate decisional law, *c.g.*, the *Bratton* case, *supra*. The identical question raised by Carbo with respect to Counts Six and Nine was decided in 1958 in the Eastern District of New York. This appears to be the only case reported since the promulgation of the Rules which considers the question of the absence of a venue allegation in certain counts of an indictment.

United States v. Weishaupt, 167 F. Supp. 211
(E. D. N. Y. 1958).

The court said:

“There is no merit in the defendant’s claim that Count 5 of the indictment is defective because of its failure to state the venue of the alleged crime. Rule 7(c) of the Federal Rules of Criminal Procedure prescribes the ‘Nature and Contents’ of an indictment. It neither expressly nor impliedly provides that the venue of the alleged offense be stated. It requires, in pertinent part, that ‘the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *

It need not contain * * * any other matter not necessary to such statement.’ Even error in or the omission of the statute or regulation alleged to have been violated, provision for the citation of

which is made in the Rule, is not ground for the dismissal of the indictment, except for reasons not here relevant. Count 5 charges the commission of an offense against the United States. The information claimed to be lacking in the indictment may be obtained through a bill of particulars under Rule 7(f) of said Rules.”

United States v. Weishaupt, supra, at p. 212.

In the case at bar, appellants were fully advised almost one and one-half years before the trial that the venue of the crimes charged in the indictment was in each count in the Central Division of the Southern District of California. They can claim no surprise, therefore, that the proof adduced at trial established *that venue* for each count, since the prosecution is held to its bill of particulars.

United States v. Neff, 212 F. 2d 297, 309 (3 Cir. 1954).

The *Weishaupt* case quite correctly stresses that venue is not one of the elements of the offense. It is merely the *forum* where the defendant must be tried, unless he waives this procedural right. The defendant's right, therefore, is to be tried in the proper venue, not to be *charged* with the proper venue. It is clear that venue is waivable.

Rodd v. United States, 165 F. 2d 54, 55 (9 Cir. 1948);

United States v. Jones, 162 F. 2d 72, 73 (2 Cir. 1947).

It is equally clear that the essential elements of the offense which must be included in the indictment pursu-

ant to Rule 7(c) must be pleaded and are not waived by failure to move for dismissal prior to trial.

Carlson v. United States, 296 F. 2d 909, 910 (9 Cir. 1961).

Each of the essential facts constituting the offense charged must not only be pleaded, each must be proved beyond a reasonable doubt.

Holland v. United States, 348 U. S. 121, 138 (1954).

However, the facts evidencing that the trial is in the proper venue need not be established beyond a reasonable doubt.

Dean v. United States, 246 F. 2d 335, 338 (8 Cir. 1957);

Blair v. United States, 32 F. 2d 130, 132 (8 Cir. 1929);

Cf. United States v. Karavias, 170 F. 2d 968, 970 (7 Cir. 1948).

In the *Jones* case, *supra*, Judge Frank held that a defendant waived his constitutional right to a trial in the proper venue by going to trial on an indictment which indicated on its face that it was returned in the wrong venue. The following year, Judge Frank wrote the opinion in a case in which the indictment alleged the proper venue but the proof adduced at trial showed that the venue was in another district. Judge Frank held that the defendant did not impliedly waive his right to insist on a trial in the proper district by going to trial on that indictment, since the indictment did not put him on notice of error. He suggested, however, that a waiver similar to the one in *Jones*, *supra*, might have

been found to exist, “[I]f, during the trial, defendant had *in some manner* been put on notice that the government intended to rely on that New York City offer as a crime, for which he was being tried. But here there was nothing to notify him. . . .” [Emphasis supplied.]

United States v. Michelson, 165 F. 2d 732, 734 (2 Cir. 1948), affirmed 335 U. S. 469 (1948).

It follows from this dictum that notice of venue might be communicated to a defendant by some medium other than the indictment. That is exactly what was done here in the bill of particulars, with respect to the two counts of which Carbo complains, and in conformity with the *Weishaupt* ruling.

The correctness of the foregoing analysis in the light of Rule 7(c) is confirmed by the traditional distinction which has been recognized between the unwaivable requirement to establish *subject matter* jurisdiction in the district court by an indictment which alleges the essential elements of an offense against the United States and the waivable right to be tried in the forum of the crime. 18 U. S. C. §3231 confers jurisdiction to “the district courts of the United States” over the subject matter “of all offenses against the laws of the United States.” An indictment which fails to charge every element of an offense, fails to state an “offense against the laws of the United States.” However, no *jurisdictional* defect exists if the wrong venue is invoked. This is not an error subject to collateral attack.

Mahaffey v. Hudspeth, 128 F. 2d 940, 942 (10 Cir. 1942).

In this case, appellants have shown no error of venue at all. Their right to be tried in the forum of the crime was respected. Their convenience in being informed long in advance of trial of the theory of venue was satisfied. Since Rule 7(c) does not require venue to be pleaded in the indictment and provides for a bill of particulars for elaboration of the charge when cause is shown, the bill of particulars eliminated any problem of surprise at trial. Having shown no prejudice in connection with venue, appellants' contentions should be rejected.

B. The Trial.

1. Gibson's Motion for a Trial Severance Was Properly Denied.

Gibson raises the frivolous contention that he was not properly "joined as party defendant". [Gibson's Op. Br. 44-45.] Presumably, he is referring to the denial of his pre-trial motion for a trial severance. [I C.T. 192-193, 210.] However, considering Gibson's concession of the obvious, to wit, that the denial of a severance of defendants for trial is in the sound discretion of the trial court, and applying that test to his brief, which fails to suggest a single *fact* tending to show an abuse of that discretion, it is difficult to understand why he has even raised this contention on appeal.

Rule 14, F. R. Crim. P.

Indeed, the only severance case cited by Gibson, establishes the futility of his position.

Schaffer v. United States, 363 U. S. 511 (1960).

The facts of *Schaffer* raise an arguable case for severance, since the Government failed to prove the one con-

spiracy count which connected the other five counts and all defendants. Still, the Supreme Court held that the district court did not abuse its discretion in refusing a severance once the conspiracy count had been dismissed and the motions for severance made.

Here, only a pre-trial motion was made. The indictment is one homogenous pleading which is connected by one overriding extortion scheme. The substantive counts are also pleaded as overt acts in the two conspiracy counts on which Gibson was convicted. Although Gibson contended in his pre-trial motion that "much of the testimony in the trial will be inadmissible and not applicable to this defendant", without suggesting any basis in fact for this assertion, he has abandoned this contention in his Opening Brief. [I C.T. 193.] The Statement of Facts, above, demonstrates why he can no longer urge this point.

Cases presenting stronger factual showings for severance of defendants have held that the motion was not well taken.

United States v. Postma, 242 F. 2d 488, 493 (2 Cir. 1957), *cert. den.* 354 U. S. 922 (1957);

United States v. Varlack, 225 F. 2d 665, 673 (2 Cir. 1955);

United States v. Cohen, 124 F. 2d 164, 165-166 (2 Cir. 1941), *cert. den.* 315 U. S. 811, *reh. den.* 316 U. S. 707 (1942);

United States v. Boyance, 30 F.R.D. 146 (E. D. Pa. 1962).

The propriety of Judge Tolin's ruling on Gibson's pre-trial motion should be tested by the facts apparent in the record at the time he denied the motion. By this

standard his ruling was correct. However, if we test the ruling with the advantage of hindsight, a severance of Gibson's trial would have been an unconscionable imposition upon the judicial process. The trial required more than three months of the court's time. Seventy-seven witnesses were brought from all parts of the nation. Virtually none of the prosecution's evidence was wholly inapplicable to Gibson's case. All defendants were convicted on both conspiracy counts. Thus, in retrospect, the record demonstrates the wisdom of the ruling. A severance of Gibson would have amounted to an abuse of discretion.

2. Selection of Jury.

Gibson alleges error in the selection of the venire and in the impanelling of the jury. [Gibson's Op. Br. 48-50.] He fails, however, to comply with Rule 18(a) (d) by pointing out in which particular the District Court erred in the record and where he urged the grounds, now urged to this Court, as a basis for reversal to the trial judge. [Gibson's Op. Br. 22.]

(a) *No Showing Was Made of Systematic Exclusion of Negroes From Venire.*

On the first day of trial, while the *voir dire* of the *veniremen* was in progress, counsel for Gibson moved to quash the *venire* alleging the systematic exclusion of Negroes therefrom. [1 R.T. 75.] The case had been pending against Gibson for seventeen months (since September 22, 1959, when the indictment was returned), yet no pre-trial motion raising this question had been made when the issue, if in fact there were an issue, could be conveniently explored by the Court. No

affidavit was ever filed in support of the oral motion. Gibson's counsel admitted that the only basis for the motion was his visual observation that no Negro *veniremen* appeared to him to be in the courtroom. [1 R.T. 75.]

Judge Tolin pointed out to Gibson's counsel that he might have taken pains to see that Negroes were in that particular *venire* that morning if Gibson's counsel had requested it in advance. [1 R.T. 76-77.] The Court further informed counsel that this was a fresh panel commencing a new term that week, with which he had had no experience; however, the prior jury panel, which had terminated its services the preceding week, had many Negroes on it who had sat on juries in Judge Tolin's court. The Court properly denied the untimely and unsupported motion. [1 R.T. 76-77.]

At no time did counsel produce any written motion or any evidence to support his contention that Negroes had been systematically excluded from jury service. Without informing the Court when he would be prepared to do so, counsel offered to present proof, based upon the 1960 census statistics, that it would be impossible to "draw jurors in accordance with constitutional requirements, without coming up with some Negro jurors in 50." [1 R.T. 81-82.]

Gibson never produced any proof in support of his contention, although the Court indicated at that time that evidence would be taken from the Clerk and Jury Commissioner during the afternoon session that day. [1 R.T. 82-85.] That afternoon, after the Court called and questioned the Clerk of the Court and his Deputy, and made available the Jury Commissioner,

counsel for Gibson declined the Court's express invitation to cross-examine the witnesses. [1 R.T. 89-96.]

The testimony of the Clerk of the Court, John Childress, and his Deputy, Maxine Lewis, established that systematic exclusion of Negroes was not practiced in the selection of the *venire* in this case any more than it was practiced in the same Court in *United States v. Local 36 of International Fishermen*, 70 F. Supp. 782 (S. D. Cal. 1947). In that case Judge Hall carefully reviewed the practice of selecting the jury *venire* in the Central Division of the Southern District of California, and found no violation of any Constitutional provision, statute, or rule. In fact he found that there was not even a serious question about systematic exclusion of Negroes because of the frequency with which Negroes appeared as jurors in the District Court in Los Angeles. [*Id.* at p. 792.]

Judge Hall's careful analysis of the practice in Los Angeles was affirmed by this Court.

Local 36 of Internat'l Fishermen v. United States, 177 F. 2d 320 (9 Cir. 1949), *cert. den.* 339 U. S. 947 (1950).

These opinions applied the reasoning of the Supreme Court authorities cited by Gibson and concluded that the practice followed in the Southern District of California, Central Division, was lawful. The testimony of the officials of the same court in this case conclusively show that no group: ethnic, social, economic, or otherwise—is systematically or intentionally excluded from the petit jury *venire* in the Southern District of California, Central Division.

If Gibson had been prepared to prove at the proper time that which he said he could prove by statistics (and he was not prepared), still he would not have established his allegation of systematic exclusion of Negroes. He would only have established that the Negro population in the Los Angeles metropolitan community was not proportionately represented in the courtroom on a particular morning. He certainly would not have established that Negroes do not regularly appear as jurors in the District Court in Los Angeles. Judge Tolin's own observations in the record are to the contrary. [1 R.T. 76-77; 29 R.T. 4342-4344.]

The fallacy of Gibson's position, as Judge Tolin immediately pointed out to his counsel when the motion was first made [1 R.T. 76], is that a defendant in a federal criminal case has no constitutional or statutory right to have any political, economic, social, or national group represented on the *venire*. His rights are satisfied if the jury is impartial (Gibson does not claim that it was not) and if no group was systematically excluded from the *venire*. None was.

Local 36 of Internat'l Fishermen v. United States, supra, at p. 34;

Long Yim v. United States, 118 F. 2d 667, 668 (9 Cir. 1941);

Bary v. United States, 248 F. 2d 201, 206 (10 Cir. 1957);

Cf. Ballard v. United States, 329 U. S. 187 (1946);

Thiel v. United States, 328 U. S. 217, 220 (1946).

Answering a similar allegation against a grand jury, the Supreme Court said:

“ . . . Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. . . . ”

Akins v. Texas, 325 U. S. 398, 404 (1945).

Although Gibson contends in his Opening Brief that the *venire* was not selected in accordance with 28 U.S.C. §864, he fails to state where he made this contention in the trial court, just as he fails to cite any authorities which cast any doubt upon the procedure followed in calling the *venire*.

Christianson v. United States, 226 F. 2d 646, 654 (8 Cir. 1955).

(b) *The Jury Was Properly Impanelled.*

Next, Gibson alleges that the Court erred in the impanelling of the twelve jurors and three alternates, but fails to cite where in the record he preserved this point. His objections in this connection are two; both rely on failure to comply with Rule 24, F. R. Crim. P.

The five appellants were granted more peremptory challenges than the number to which they were entitled as of right. They had ten challenges to exercise jointly [2 R.T. 261], each appellant had one additional peremptory challenge that was personal to him [2 R.T. 261], and Gibson and Sica were granted an extra personal challenge each [2 R.T. 266-267, 259-261] because of special requests by their counsel. Thus, the defense had seventeen peremptory challenges, seven more than

the requirement of Rule 24(b), while the Government (contrary to Gibson's unsupported assertion that the prosecution was allowed ten [see Gibson's Op. Br. 50]) was allowed only the six peremptory challenges provided by the rule. [2 R.T. 237-238.]

Gibson's counsel objected to the system of simultaneous written peremptory challenges employed by Judge Tolin and many other federal judges. [2 R.T. 235-240, 262.] He alleges in his Opening Brief that this procedure violates Rule 24, F.R. Crim. P., in that it fails to provide the minimum number of peremptory challenges. He fails to explain why. He also fails to overcome the decisions of the Supreme Court and this Court which have sustained the procedure of impaneling followed by Judge Tolin.

Pointer v. United States, 151 U. S. 396, 412 (1894);

Hanson v. United States, 271 F. 2d 791 (9 Cir. 1959) (sustaining judgment entered by Judge Tolin where this same procedure was used).

Gibson's last point in this connection, that he was denied sufficient peremptory challenges in selecting the three alternate jurors, was not brought to the attention of the District Court at the appropriate time; therefore, he is barred from raising it here.

Christianson v. United States, *supra*.

3. Sufficiency of the Evidence.

"The appellant's first contention raises a question of the sufficiency of the above evidence, which is both direct and circumstantial. We must view this

evidence in the light most favorable to the government, including the reasonable inferences to be drawn therefrom. . . .”

Cape v. United States, 283 F. 2d 430, 433 (9 Cir. 1960).

(a) *The Evidence Is Sufficient to Sustain the Jury's Verdict.*

Reference is made to the Statement of Facts set forth above which amply demonstrates, with citations, that sufficient proof to warrant conviction was adduced against each of the appellants.

The sufficiency of evidence question has been tested by two experienced judges: the late Honorable Ernest A. Tolin, who denied motions for judgment of acquittal of all appellants, except Dragna, which matter was under submission at the time of Judge Tolin's demise; and the Honorable George H. Boldt, who, after studying a 7,828 page trial record, prepared a 1,320 page summary thereof, and denied motions for new trial for all appellants, as well as the pending motion for judgment of acquittal of appellant Dragna. Of course, Judge Boldt actually weighed the evidence, going well beyond the sufficiency question now before this Court. Judge Boldt found that.

“On the whole record this court is fully satisfied every defendant was accorded a fair trial, free from prejudicial error, and that the evidence thoroughly supports the verdict in every essential particular as to each defendant. The contentions of defendants which entailed the most exhaustive consideration of the record and analysis of authority are those

relating to the credibility of government witnesses, the admission in evidence of the recordings and their playing to the jury. *The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesseth or both. Their testimony, in all essential particulars was fully and convincingly corroborated.* Nor is there any doubt as to the admissibility of the recordings and of the propriety of their being played under the circumstances shown by the record. This court is now fully satisfied there is no substantial merit in the contentions referred to which would support a finding of prejudicial error.” [VI C.T. 1446-1448, Memorandum Order of Judge Boldt, dated November 28, 1961 (Emphasis supplied).]

(b) *There Is Substantial Evidentiary Corroboration, Both Circumstantial and Direct, of the Victims' Testimony.*

No attempt will be made in this section to restate all of the evidence sustaining the appellee's view of this case. Since the testimony of Leonard and Nesseth is set forth in great detail in the Statement of Facts, it is the purpose of this section to demonstrate the extent to which much of the evidence provided by the victims was corroborated by material facts beyond the knowledge of either.

Although appellants endeavor to create the impression that Leonard's testimony stood alone, uncorroborated by other evidence, this is contrary to fact. Not only was Leonard corroborated by Nesseth, but, as Judge Boldt pointed out in his Memorandum Order denying motions for new trial, the testimony of Leonard

and Nesseth “in all essential particulars was fully and convincingly corroborated.” [VI C.T. 1448.] Of course, the statement of appellant Gibson in his brief that “the prosecution itself had so little confidence in Leonard’s capacity for truth that he was not submitted as a rebuttal witness . . .”, is itself an untruth. [Gibson’s Op. Br. 37.] Not only did appellee have complete confidence in Leonard’s truthfulness, but he was, in fact, called as a rebuttal witness. [+3 R.T. 6348-6429.] Since this testimony comprises some eighty-one pages, it is hard to see how this was overlooked by Gibson.

Appellant Gibson took the stand in his own defense and testified that in 1949, while attorney for retiring heavyweight champion Joe Louis, he worked out a business arrangement, the object of which was to capitalize on Louis’ heavyweight title and reputation by using Joe Louis Enterprises, an existing corporation, to enter into contracts with the leading contenders for Louis’ title. [32 R.T. 4706-4710.] A series of negotiations ensued which led to the founding of the International Boxing Club of New York, and the International Boxing Club of Illinois. The sum of the testimony clearly indicates that Gibson’s purpose, after joining forces with the Norris-Wirtz interests, was to monopolize the promotion of championship prize fights and to control the destiny of world champions and top contenders. [32 R.T. 4708-4720.] See also *United States v. International Boxing Club*, 358 U. S. 242 (1959), and Judge Sylvester Ryan’s opinion in the United States District Court for the Southern District of New York, for some useful background concerning “what everyone knows” [*United States v. Compagna, supra*, 146 F. 2d at 529] in the boxing world. The

Court will note that Judge Ryan's decision, referred to by Gibson in his testimony, was handed down on March 8, 1957, and that this decision handicapped Gibson in his ability to perpetuate I.B.C. control of championship boxing as well as television promotion, and the I.B.C. was unable to enter into so-called "exclusive service contracts." [32 R.T. 4724-4728.]¹²

United States v. International Boxing Club of N. Y., 150 F. Supp. 397 (S. D. N. Y. 1957), affirmed 358 U. S. 242 (1959).

Thus, if Gibson was to maintain his control he had to substitute other procedures for those which were now outlawed by the courts. It is at this time that we see a closer relationship develop between Gibson and Carbo, and can appreciate the full significance of Gibson's acknowledgment on the witness stand that he used the underworld in the operation of his (I.B.C.'s) business as a type of preventive medicine and that he was unaware of the methods used by the underworld to obtain his (Gibson's) ends. [34 R.T. 5050, 35 R.T. 5131-5136, 5138.]

This testimony concerning underworld activity in behalf of the I.B.C. is corroborative of Leonard's and Nesseth's testimony that they were confronted with threats of underworld and strong-arm tactics. Moreover, Gibson admitted certain dealings with Carbo which in themselves characterize the sinister nature of their

¹²As the Supreme Court pointed out in *International Boxing Club of New York v. United States*, *supra*: "[I]n amassing their empire, appellants obtained control of champions in three divisions [heavyweight, welterweight, and middleweight]. The choice given a contender thereafter was clear, *i.e.*, to sign with appellants, or not to fight." [358 U. S. 242 at p. 248.]

relationship: (1) periodic payoffs to Carbo in the name of Viola Masters (Carbo's wife's maiden name) [32 R.T. 4759-4773], (2) a payoff to Palermo on May 15, 1959, at the culmination of the conspiracy: a \$5,000 check and a \$4,000 check payable to Palermo and drawn at Gibson's direction [Ex. 33; 33 R.T. 4949-4955], (3) significant contacts between Gibson and Carbo [see *e.g.* 30 R.T. 4516-4520; 32 R.T. 4757-4759] though Carbo had no legitimate connection with boxing.

When one appreciates Gibson's approach to the business of the I.B.C. and the methods which he was using shortly before the offenses comprehended by this indictment, then the testimony of Leonard and Nesseth becomes irrefutable. Gibson, the operating head of the I.B.C., a lawyer and a person with sufficient polish to deal with respectable and important business personalities, had to keep his relationship with the underworld in the background. Insofar as Leonard and Nesseth were concerned, Gibson could not appear to be openly tied to Carbo and Palermo. They could draw the inference, but it would have to remain an inference only until independent evidence was produced, as it was during the trial of this case. The pressures exerted upon Leonard and Nesseth were rooted in Gibson's business policy and the conspiracies of which he stands convicted were a natural consequence of Gibson's relationship with Palermo and Carbo.

In evaluating circumstantial corroboration of Leonard's and Nesseth's testimony, it is important to note that they could not have known of the frantic activity in which Carbo, Palermo, Sica and Dragna engaged during the period April 24, 1959, through June 4, 1959.

[See Statement of Facts, above.] Similarly, Leonard and Nesseth could not have known about motel and hotel registrations under false names and false or non-existent addresses, *e.g.*: at the Blue Mist Motel [Ex. 107-A], the Chateau Resort Motel [Ex. 108-A], the Last Frontier Motel [Ex. 168], and the Beverly Hilton Hotel. [Exs. 84-A and 85-A.] Nor could they have known of all the telephone activity among the conspirators, revealed by the toll slips in evidence. [See Appendix A, below.]

All of the hotel and motel registrations referred to above illustrate the furtive and surreptitious activity of the appellants Carbo and Palermo, during the period of the conspiracy, their passion for anonymity, their insistence upon keeping their exact whereabouts unknown and upon covering their trail as they moved from place to place, as described by the testimony of numerous witnesses. [5 R.T. 624; Ex. 101-A for Ident., at pp. 24, 56; 20 R.T. 2835-2837; 44 R.T. 6575-6578; 5 R.T. 635-643; 17 R.T. 2559; 39 R.T. 5852, 5855; 22 R.T. 3228; 23 R.T. 3366, 3375; 30 R.T. 4516-4520; 33 R.T. 4925, 4939-4945; 22 R.T. 3201.]

Further corroboration evidencing a common scheme and plan can be found in the testimony of Detective Anthony Bernhard who, with another detective, was working undercover in Washington, D.C., Bernhard overheard conversations between Carbo and Palermo and Carbo's order to Palermo to call the number of Lou Viscusi, manager of lightweight champion Joe Brown, to demand \$2,000 from him. Bernhard testified about Palermo's report to Carbo, after he had made the call, that Viscusi was frightened and had said he did not

have the money. Palermo announced that he had told Viscusi to "look in the drawers, you know where to find it", after which the people around Carbo laughed. [43 R.T. 6520-6521.]

Parenthetically, this not only corroborates the *modus operandi* of the conspiracy revealed by the testimony of Leonard and Nesseth, but also gives emphasis and added significance to Gibson's testimony regarding his business policy of using the underworld. [34 R.T. 5050; 35 R.T. 5131-5136, 5138.]

Leonard's testimony about the Miami meeting on January 6, 1959, is also well corroborated. Leonard testified that he was met at the airport by a man named "Mike" whom he had never seen before; that he was taken to the Blue Mist Motel, and that Palermo stayed with him. The following morning they moved across the street to the Chateau Resort Motel at Palermo's instance. Independent evidence in the form of motel registrations from the Chateau and Blue Mist Motels, referred to above, shows registration by Palermo in one motel as "George Tobias," and in the other as "Lew Gross," with different, and in each case, false addresses. [Exs. 107-A, 107-B, 107-C; Exs. 108-A, 108-B; Exs. 109-A, 109-B.] Palermo was identified in court by the desk clerk as the "George Tobias" who registered at the Blue Mist Motel [17 R.T. 2558-2559], despite Sica's attempt to mislead him by standing up when the witness pointed at Palermo. [17 R.T. 2559, line 6.] When Leonard registered for himself at the Chateau Resort Motel, he used his true identity. [Ex. 109-A.]

Furthermore, Leonard identified a photograph of Palermo and another male [Ex. 50], and explained that the man with Palermo in the photograph was the "Mike"

who had met him at the Miami airport. [5 R.T. 633-635.] Thereafter, Sergeant Moran of the St. Louis Police Department identified "Mike" as Abe Sands who had been with Palermo in St. Louis. [18 R.T. 2629.]

Thus, the connection between Palermo and Sands, known to Leonard as "Mike", was provided by an independent witness, Sgt. Moran, who had seen Palermo and Sands together in St. Louis on the night of the championship fight between Martinez and Akins in which Akins won the welterweight title. [18 R.T. 2629-2630.] Further corroboration of Leonard's testimony involving "Mike" was provided by Carmen Basilio and one of his managers, John DeJohn, who testified that someone named "Sandy or Smoky" (or "Sandy or Sparky") picked them up at a restaurant and chauffeured them to an unknown address where they quite unexpectedly were confronted by Carbo. [20 R.T. 2835-2837; 44 R.T. 6675-6676.] "Mike" or "Sandy" are unquestionably the same person, *Abe Sands*, who acted for Carbo and Palermo as chauffeur and intermediary to bring Leonard, Basilio, and DeJohn into the illustrious presence of Carbo. In each case, the person Carbo wanted to see was told that someone would pick him up because *Jim Norris* wanted to see him. [5 R.T. 624, 628; 44 R.T. 6675.] Of course, Norris was not present in either instance, only Carbo. [5 R.T. 637.] Both of the Carbo confrontations in Miami occurred in January, 1959. [44 R.T. 6675-6676; 5 R.T. 638.] Joe Sonken also identified "Mike" in the photograph as "Sandy". [21 R.T. 3018-3019.] Akins' manager, Bernard Glickman, admitted delivering \$10,000 in currency to a Carbo courier identified to him as "Mike". [29 R.T. 4270-4271.]

DeJohn testified that he visited Carbo and Palermo together at the Treasure Island Motel in February, 1959, in Miami, Florida. On cross-examination, Palermo admitted being at the Treasure Island Motel in early January, 1959, but insisted he was alone. [40 R.T. 5948-5950.] The motel records show he may have been lonely but certainly not alone, since he was occupying three rooms at the Last Frontier Motel under a false name with *four* unidentified companions. [Exs. 168, 169; 44 R.T. 6571-6573.] Present in the room, according to DeJohn, was Carbo's associate Gabe Genovese. [44 R.T. 6676.] Leonard was also confronted by Carbo and Gabe Genovese when he visited Palermo at the Chateau Resort Motel in Miami, Florida, on January 6, 1959. [5 R.T. 641-642.]

Palermo's criminal intent is reflected by the records which he made on his trip to Los Angeles on May 1, 1959, at the time when this conspiracy was about to explode. He registered at the Beverly Hilton Hotel under the name of George Tobias. [39 R.T. 5857; Exs. 84-A, 84-B, 85-A-85-C.] Thereafter, on the night of May 4, he received a telephone call from Truman Gibson; significantly Gibson called him person-to-person under Palermo's alias of "George Tobias." [31 R.T. 6004, 6030-6031.] Palermo and Dragna de- of the first persons he met in Los Angeles after leaving Gibson in Chicago that day was Dragna. [40 R.T. 6004; 6030-6031.] Palermo and Dragna described this meeting as accidental. The events of the ensuing week belie their testimony. Among other things, Palermo had not seen Dragna in many years. [38 R.T. 5641-5642.] After consulting with Dragna, Palermo met with Sica, and it is *undisputed* that Pa-

lerno asked Sica to intercede in the situation involving Leonard and Nesseth and to bring pressure to bear upon them even though he (Sica) had no previous connection with the matter. [36 R.T. 5381-5395; 37 R.T. 5482-5487.]

It is also *undisputed* that Sica and Palermo talked to Leonard that night (or the following night) in Palermo's room at the Beverly Hilton Hotel and that Sica took Palermo's side in the heated discussion which occurred there. In the light of this, Leonard's version of the conversation and the events leading up to it [5 R.T. 684-692; 6 R.T. 719-722] was the proper one for the jury to believe. Moreover, even Sica testified that he had contacted Leonard on Palermo's behalf (although Sica and Palermo had not seen each other in years) and told Leonard that he, Sica, wanted to see him in the lobby of the Beverly Hilton Hotel. Sica admitted on the witness stand that he did not tell Leonard why he wanted him to come to the Beverly Hilton Hotel and that Leonard walked into the lobby unaware of Palermo's presence in Los Angeles; that Sica then took Leonard upstairs to Palermo's room where Sica and Palermo laid down the law to Leonard. Thus, Sica's role *as an enforcer* is established beyond doubt.

When pressed to explain why he visited the Legion Stadium on May 6, 1959, Sica had no rational explanation. [37 R.T. 5497-5499.] Sica's inability to explain his presence at the Legion is quite comprehensible when one considers the testimony of Don Chargin and Manuel Dros in connection with Sica's efforts to hurt Leonard by intimidating Chargin who was investing new capital in Leonard's failing business. Sica had Willie Ginsberg call Dros to instruct Dros to call a certain

number from a telephone booth. When Dros called that number, Sica answered. Sica asked where he could get in touch with Chargin, and Dros said he did not know. Sica then told Dros that he was working “for the wrong people”. One month later, according to Chargin, the day before he was planning to fly to Los Angeles, he received an anonymous telephone threat warning him to stay out of Hollywood, and the caller referred to a recent mishap to Leonard. [15 R.T. 2205-2206, 2237, 2239.]

The bridge between these two occurrences is found in the Daly-Leonard conversation on May 14 at the Ambassador Hotel in which Daly told Leonard that the Sicas would have an innocent explanation of the whole thing, that: “The first thing they are going to say to the cops, ‘somebody owes my friend, my friends, money and I only asked them to pay it.’” The stories told by Dragna and Sica on the stand read like Daly’s script. Daly also explained how Chargin and Livingston would be frightened away so that Leonard would be unable to obtain necessary capital for the failing Club, “Oh, they’ll get somebody up around San Francisco to go see him and tell him to lay off you people. You know. So it’ll make the guy think a little bit, too, you know.” [Exs. 100-102, 176, 101-A for Ident. at p. 49.]

As a matter of fact, the entire Daly-Leonard conversation [Exs. 100-102, 176, 101-A for Ident.] is corroborative of Leonard’s and Nesseth’s testimony with regard to what was happening, and Daly not only confirms the existing situation in boxing, but points out that this sort of thing has been going on for years, “Carbo don’t give a fuck as long as they’re—they keep

their income up. That's all. That's how they live. And that's how they are going to live as long as they can get away with it." [*id.* at p. 11.] In this connection, Palermo was asked on cross-examination: "There was nothing wrong with what you were doing, was there?" He replied, "I don't believe so. We have been doing this for years. This is the first time this kind of case ever came about." [40 R.T. 5985.]

The very fact that Sica and Dragna, who until May, 1959, had nothing whatsoever to do with the situation, came into the picture, corroborates Leonard's testimony with regard to threats of Carbo that he had friends on the West Coast who could enforce his will. Note that Daly, Parnassus, and Underwood *coincidentally* happened to meet Sica at Dorando's Restaurant the week after Sica and Dragna visited Leonard. [26 R.T. 3734-3734d; 28 R.T. 4108-4111.]

There is dramatic corroboration of Leonard's testimony concerning the telephonic threats from Carbo. On April 28, 1959, Leonard and Nesselth were in Leonard's office at the Hollywood Legion Stadium. They were discussing the pressure which Carbo was exerting to get Nesselth to give up his responsibilities as Jordan's manager. The telephone rang and, after a few minutes of stammering responses, Leonard turned white, hung up the telephone, ran into the ladies' room across the hall, and vomited. [Ex. 21.] Leonard testified that during this call Carbo had told him that he (Carbo) had friends on the West Coast, that they would meet at the crossroads, that Leonard would get hurt, and when he said hurt—he meant dead; that he would gouge Leonard's eyes out. [5 R.T. 680-681; 13 R.T. 1818-1824.]

Some question was raised by counsel for Carbo as to whether Nesseth could have returned from New York in time to be in Leonard's office on April 28 in time to witness this call. The making of the call from one of Palermo's Philadelphia telephones is reflected by Exhibit 21. Nesseth's testimony that he was present, having returned by plane from New York, is corroborated by Exhibits 104-A and 105-A, hotel registrations for Mr. and Mrs. Nesseth and Don Chargin, showing that the Nesseths and Chargin checked out of the Hotel Edison in New York City at 5:22 p.m., April 27, 1959. The record was somewhat confused by appellee's mistake in introducing Exhibit 106-A which pertains to the following year and was erroneously and superflously offered and received into evidence. [Exhibit 106-A is a registration of Chargin at the Hotel Edison in May, 1960, one year later, and has nothing to do with the facts of this case.]

Further corroboration of this Carbo telephonic threat is found in the fact that Leonard testified that within a few minutes of Carbo's call the telephone rang again. This time Palermo was on the line, trying to calm Leonard down, obviously afraid that Leonard would do something intemperate, such as going to the police. Nesseth corroborated the fact that the second call was received and that Leonard said it was from Palermo. [13 R.T. 1818-1819, 1826-1827.] A telephone toll slip [Ex. 22] corroborated both Leonard and Nesseth. It shows a call within 5 minutes of the end of the Carbo call. Palermo denied that he ever was at the Cori house with Carbo. [40 R.T. 5999]; however, John DeJohn saw Palermo, Carbo and Tony Ferrante

together in a private residence in Philadelphia in April or May, 1959. [44 R.T. 6577-6578.]

Of course, substantially all of the testimony in the record evidences the basic plot about which Leonard and Nesseth testified, namely, Palermo's unwarranted and illegal concern over the future of Don Jordan, a concern rooted in Carbo's desire to main his criminal monopoly of the welterweight title; and Gibson's silent working arrangement with Carbo and Palermo. Gibson's criminal complicity with them was calculated to guarantee that nothing would happen to upset his plans for the broadcasting of the title fights in December, 1958, and April, 1959, on nationwide television.

The testimony of Sgt. Moran and Sam Muchnick about the Jordan-Akins fight in St. Louis on April 24, 1959, corroborates Leonard and Nesseth. Beyond question, Nesseth was in fear when he went to St. Louis and contacted the St. Louis Police. Sgt. Moran testified that when Nesseth saw Palermo, he was scared. [18 R.T. 2626, 2628.] The testimony of Muchnick eliminates all doubt. Muchnick testified that Palermo dared to go to his (Muchnick's) office and ask him to calculate 15 per cent of the purse. Then he inquired of Muchnick whether Nesseth had left this money for him. [18 R.T. 2600-2602.] In addition, Nesseth testified that Palermo came to his hotel room, demanded money from him, and when he rebuffed Palermo, they engaged in a heated discussion during which Palermo said that some *big people were going to be upset*. [13 R.T. 1808-1813.] Palermo admitted, on the witness stand, that he made this visit to Nesseth after unsuccessfully attempting to persuade

Gibson to join him there, *and that he discussed with Nesseth his claim to part of Jordan's purse.* [39 R.T. 5820; 31 R.T. 4617-4618; 39 R.T. 5823.] *This admission by Palermo is conclusive of his guilt, because under no reasonable construction of the evidence was Palermo entitled to any of Jordan's purses.* (It is undisputed that Palermo had nothing to do with the promotion of this fight.) Moreover, Don Chargin and Harvey Livingston overheard Palermo tell Nesseth, "The man isn't going to like this." [15 R.T. 2225; 16 R.T. 2325.] Carbo was often referred to as "the man" as Palermo admitted. [40 R.T. 5996-5997.] In the context of this conversation, it was clear that Carbo was "the man". Furthermore, the whole record reflects that it was of Carbo that everyone was in fear and that a threat, either directly from Carbo, or one transmitted in his name, was certain to induce fear. In this connection, Gibson admitted that he considered that "pressure" was being applied to him when Chris Dundee, the Miami fight promoter, called him for a favor and then put Carbo on the line. [33 R.T. 4939-4945.]

The recorded telephone conversation [Ex. 177] between Leonard and Palermo on the evening of May 5, 1959, the night before Sica and Palermo appeared at the Hollywood Legion Stadium [Exs. 96, 97, 96-A for Ident.] provides proof to a certainty of Carbo's ("Our friend") joint masterminding of this extortion plot with Gibson. It also reveals that Carbo and Gibson were applying simultaneous pressure of economic attrition and of threats of violence to Leonard and Nesseth. In this call [Ex. 177], particularly note Palermo's admission of earlier telephone threats.

The only time Palermo used his own name to register during the entire period of the conspiracy was when he was staying in the Bismarck Hotel in Chicago (owned by Norris & Wirtz) at the expense of the I.B.C. [12 R.T. 1732, 1737; Exs. 70, 71, 72, 73; 40 R.T. 6002; 39 R.T. 5856.] When he left the sanctuary of Gibson and the I.B.C., he would resort to an alias, either because he was travelling with and acting for Carbo (as in Miami) or travelling on illicit business for Carbo (*e.g.*, at the Beverly Hilton Hotel). Nor would Carbo ever register at a hotel or motel under his own name. Despite his use of the Chateau Resort Motel in Miami as a meeting-place with Leonard, Carbo's name was not to be found on the register. Boxing people who admitted knowing Carbo for many years insisted that they did not know where to call him or at what address to visit him. If they were taken to Carbo's "home", it was under clandestine circumstances like those experienced by Basilio and DeJohn. All of this corroborates Leonard's testimony that Palermo remonstrated with him for using Carbo's name over the telephone [See Ex. 177 where Palermo warned Leonard, "No names!"]

The \$1725 extortion payment to Palermo took a circuitous route under Palermo's guidance, demonstrating his consciousness of guilt. Clearly the appellants attempted to obscure and conceal the delivery of these funds to Palermo. They would have succeeded if it were not for the fact that the witness Sonken was pinned down by the F.B.I. who had discovered that Sonken had made false entries to help cover Palermo's tracks. Thus, it was proven by evidence independent of Leonard's testimony, that (a) Leonard drew a check

in the name of Clare Cori (at Palermo's direction) [Ex. 53]; (b) that the check was mailed to Clare Cori's residence in Philadelphia [Exs. 54, 55]; (c) that this residence, and its telephone, were commonly used by Palermo and that he gave this number as one where he could be reached [Ex. 52; 39 R.T. 5883-5885]; (d) that Palermo's wife, Clare Cori, actually received the check by registered mail and signed a return receipt for it [Ex. 54]; (e) that the check was transmitted to Miami to Palermo [39 R.T. 5836; 21 R.T. 3012-3014]; (f) that Palermo asked Sonken to cash the check [21 R.T. 3012]; (g) that Sonken deposited the check for collection and wired Leonard's Los Angeles bank on which the check was drawn [21 R.T. 3013]; (h) that when he was advised that there were sufficient funds to cover the check, he drew another check to the order of "Carmen Cossara" for \$1700, indorsed the name Carmen Cossara on the check and gave the proceeds to Palermo [21 R.T. 3014-3016; Ex. 124; 39 R.T. 5827]; (i) that Sonken kept \$25 for *telegraph costs* [21 R.T. 3023]; and (j) that "Carmen Cossara" was a fictitious person and he, Sonken, knew it was a fictitious person. [21 R.T. 3020.]

To make it additionally clear that all of the parties involved were treating this as if it were the fruits of a crime which should not be accurately reflected, Sonken lied to the F.B.I. when he was first interviewed concerning this matter. [21 R.T. 3046-3050; 42 R.T. 6272-6274, 6276-6279.]

The timing of this check corroborates Leonard's testimony that it was a percentage of Jordan's purse in the Gutierrez fight held January 22, 1959. The

check itself, bearing the date January 27, 1959, corroborates Leonard's testimony about the conversations with Carbo and Palermo on January 27, 1959, during which Carbo and Palermo threatened him with violence if he did not send 15 per cent of Jordan's purse. This call was from a telephone booth in response to a message which Leonard received at his home to call "Frank" at the "Palermo Hotel". [5 R.T. 656] The "Palermo Hotel" was Clare Cori's residence and "Frank" was either Palermo or Carbo. [Note the reference to Carbo as "Mr. Frank" in Bernhard's testimony: 43 R.T. 6520.] Gibson admitted that Palermo had also referred to himself on the telephone as "Mr. Frank". [29 R.T. 4026.]

Nesseth was with Leonard when Leonard returned the call from a telephone booth, and Nesseth remembered the call because he had to obtain a lot of quarters for Leonard. [13 R.T. 1796.] Leonard's and Nesseth's testimony was strongly corroborated by the F.B.I. when they located Exhibit 13, a telephone toll slip which, on its face, showed that 18 quarters, 3 dimes, and 2 nickels were deposited in the public telephone located in a Hollywood drug store for a call to Clare Cori's residence in Philadelphia, the same place where the check was sent. [Exs. 53, 54, 55.]

Corroboration of Leonard's fear, arising out of Carbo's and Palermo's demand that he send the money forthwith on January 27, 1959, is to be found in the fact that Leonard back-dated the Clare Cori check [Ex. 53] to *January 27, 1959*, the date of the call, rather than dating it February 6, the date he sent it. [Reflected by the date February 6, 1959, on the

postal registration form, Ex. 55.] When Palermo pressed him for the money a day or two before February 6, 1959, Leonard told him that his son had mailed it without postage on January 27, 1959, the day of the call from Carbo and it had been returned, so he would have to mail it again. [5 R.T. 664.]

Gibson's testimony further reveals the pressures being exerted by Palermo and Carbo to obtain their illegal share of the proceeds of the Gutierrez fight from Jack Leonard. He admitted, on cross-examination, that Palermo had started badgering him on the telephone immediately after the Gutierrez fight in his (Palermo's) attempts to get in contact with Leonard. [33 R.T. 4890-4892.] Gibson even admitted that Leonard told him in early February, 1959, that he had to have money to give to Palermo, but he denied that Leonard told him why he needed the money. [37 R.T. 4892-4894.] Gibson took this position at trial because of the "story" concocted by the appellants concerning a mythical agreement between Palermo and Leonard to purchase a Mexican fighter named Toluca Lopez. This story, rejected by the jury, was apparently contrived by the appellants to explain the incontrovertible payment of \$1725 by Leonard to Palermo by check. [Ex. 53.]

The testimony of Dragna and Palermo was calculated to give form and substance to the Toluca Lopez story. It was Palermo's contention that the \$1725 check was partial repayment of a supposed \$4,000 advance made by Palermo to Leonard in order to purchase Toluca Lopez. Of course, Gibson required a cover story for his \$1800 check from Chicago Stadium

Corporation to Leonard. [Ex. 56.] He would be admitting the existence of the conspiracy if he admitted that he sent this check to Leonard pursuant to his agreement with Nesseth and Leonard of October 23, 1958, that he would bear the monetary expense of the demands of Carbo and Palermo, if Nesseth and Leonard would merely agree to Carbo's demand in order to avoid cancellation of the December 5, 1958, title fight. Therefore, Gibson concealed the true purpose of this check in his corporate records by attributing it to an advance on the Porterville promotion. [Exs. 66, 67 and 68.]

Gibson remained faithful to this story when he took the witness stand. However, the testimony of James Ogilvie, the person in charge of the books at the Hollywood Legion Stadium, demolished Gibson's "Porterville advance" story. Ogilvie confirmed Leonard's testimony that he (Ogilvie) issued a Hollywood Boxing and Wrestling Club check in the amount of \$1800 [Ex. 57] to Jack Leonard payable to cash, after receiving a telephone call from Gibson. Gibson had instructed Ogilvie to issue this check because Gibson was making a payment to "a friend" (unidentified) in Los Angeles. *Ogilvie testified that Gibson made no mention of an advance on a Porterville promotion.* [15 R.T. 2140-2142.]

The remains of appellants' fabrication crumbled during appellee's rebuttal case when Palermo's personal accountant, Irvin Sklar, produced his and Palermo's records underlying Palermo's 1959 federal income tax return. *These records reflected the \$1725 payment as earned income from a boxing promotion involving*

Jack Leonard. [Exs. 171 and 172.] Palermo's retained copy of his 1959 income tax return [Ex. 170] and an exemplified copy of the return filed by Palermo for 1959 [Ex. 174] revealed that Palermo reported his income to the Internal Revenue Service treating the \$1725 as an income, and thereby taxable, item. This was inconsistent, of course, with Palermo's testimony on cross-examination, that the receipt by him of the \$1725 check addressed to Clare Cori was *not* income but instead the partial repayment of an advance by him to Leonard. [39 R.T. 5801-5802; 40 R.T. 5970; 39 R.T. 5881.]

Even the original extortive demand made by Palermo in his telephone call to the Olympic Auditorium on October 23, 1958, was admitted by Palermo on the stand because of Gibson's admissions concerning his discussion at his Ambassador Hotel suite later that afternoon with Leonard, Nesseth, and Jackie McCoy. Palermo confessed, in the course of his testimony, that he had told Leonard that he was in for half of the fighter or there would be no fight. [39 R.T. 5795.]

The story, concocted by Palermo, Sica, and Dragna to explain their peculiar activities from the time Palermo arrived in Los Angeles on May 1, 1959, was destroyed by Palermo's admission that he had lied to Captain James Hamilton of the Los Angeles Police Department (after he was arrested on May 6, 1959, for petty larceny at the Los Angeles International Airport.) [41 R.T. 6095-6096.] During his interrogation by Captain Hamilton, *Palermo stated that he did not know Dragna and that he had not seen Sica in Los Angeles during that trip*, notwithstanding the fact that

he had been with Sica earlier that day at the Hollywood Legion Stadium in Leonard's office, and notwithstanding the fact that he had met Dragna at Puccini's Restaurant on May 1, 1959, and at Leonard's office at the Stadium on May 4, 1959. [38 R.T. 5615-5616.] Furthermore, Palermo and Sica both testified to meetings at the Beverly Hilton Hotel on May 2, 1959, and at Perino's Restaurant on May 5, 1959. Finally, Dragna and Sica testified to knowing Palermo for several years prior to May 1, 1959. [38 R.T. 5609-5610; 36 R.T. 5313.]

Gibson's cross-examination is very revealing of the extensive conspiracy to dominate the principal boxing titles, engineered primarily by Gibson and Carbo over the decade of the 1950's.

Gibson conceded that he made certain very damaging admissions to the United States Senate Committee on the Judiciary which were inconsistent with his direct testimony at trial. He made more damaging admissions during cross-examination concerning the operation of this conspiracy as it focused upon the welterweight title during the years 1958 and 1959.

During the first half of 1958, the welterweight title was vacant and an elimination contest was established to select a new title holder. Gibson reluctantly admitted a meeting with Carbo in Gibson's Roosevelt Hotel suite in New York City in early 1958. Gibson was aware that Virgil Akins' manager, Bernard Glickman, was Carbo-controlled. This was his admitted characterization of Glickman before the Kefauver Committee. He defined this to mean that Glickman consulted with Carbo on the matches he would make for his fighters.

In this meeting at the Roosevelt Hotel, according to Gibson, Carbo expressed interest in the planned elimination match between Akins and Logart. Gibson was also forced to admit, during cross-examination, that he had stated under oath to the Kefauver Committee that Carbo's participation in the making of the Logart-Akins match cost the I.B.C. an additional \$10,000 to \$15,000. [32 R.T. 4757-4759, 4773-4778.] Glickman also admitted such consultations with Carbo. [29 R.T. 4259, 4266-4268.] Further corroboration of Carbo's control of Glickman is evidenced by Glickman's admission, on cross-examination, that he delivered \$10,000 in currency to a courier sent by Carbo (once again, the perennial "Mike") as a "loan" to Carbo evidenced by no receipt. [29 R.T. 4270-4271.]

Thus, when Akins became welterweight champion, Carbo once again controlled that title. Gibson took credit for making Jordan the number one contender for the welterweight crown, testifying that he arranged it. [32 R.T. 4704.] This historical background explains the inevitability of Palermo's and Gibson's actions on October 23, 1958, and thereafter. If Jordan was to fight Carbo's man, Akins, for the title, Carbo required the guarantee of a secret interest in Jordan, as insurance against the possibility that the title would pass to Jordan. Gibson's admission of his discussion with Leonard and Nesseth on October 23, 1958, after the initial telephonic demand by Palermo, evidences his traditional role in the televised boxing industry as the economic enforcement arm of the Carbo-I.B.C. alliance. Leonard and Nesseth did not make up the story that the possibility of Carbo-inspired violence was discussed, and Gibson confirmed Nesseth's and

Leonard's testimony that he (Gibson) belittled the likelihood of violence saying that that sort of thing went out with "high button shoes." [33 R.T. 4843-4852; 34 R.T. 4971-4975; 14 R.T. 2061-2062.]

Carbo had a habit of joining telephone conversations to add his coercive influence. The January 27, 1959, and April 28, 1959, telephone threats from Carbo and Palermo, testified to by Leonard and corroborated by Nesseth, were not unique. Gibson was forced to admit that he considered the added presence of Carbo on a telephone call as "pressure" when he described a call to him initiated by Chris Dundee in early 1958 [Dundee testified for the defense and participated in the Chateau Resort Motel meeting with Carbo, Palermo, Genovese, and Leonard on January 6, 1959. 5 R.T. 641], when Dundee was seeking a favor from Gibson. [33 R.T. 4939-4945.] Gibson's Senate testimony, admitted by him on cross-examination, indicated that the tandem telephone call was a familiar Carbo technique.

The intimate business relationship between Carbo and Gibson in their illegal control of boxing is reflected by Carbo's concern over Leonard's testimony before the California State Athletic Commission on May 20, 1959. Gibson admitted receiving a telephone call from Carbo at his home sometime after May 20, 1959, in which Carbo inquired about Leonard's testimony and expressed surprise when Gibson informed him that, according to Leonard's testimony, Palermo had actually gone into Leonard's office at the Hollywood Legion Stadium. [33 R.T. 4932-4935.] Of course, the tape recorded conversation of May 6, 1959 [Exs. 96 and 97] demonstrates how far Palermo walked and talked

his way into Leonard's office at the Stadium with Sica's illicit assistance.

Dragna not only lied about the nature and purpose of his visit to Leonard's office on May 4, 1959, but he sought to convey the false impression that it was a coincidence that he met Palermo at Leonard's office. [38 R.T. 5677-5680.] On cross-examination, Palermo admitted that he had an appointment to meet Dragna at the Hollywood Legion Stadium on May 4, 1959. [40 R.T. 6036.]

Unindicted co-conspirator William Daly played his role in the conspiracy at two significant junctures. In the early fall of 1958, his aid was enlisted by Gibson to obtain covert control of the Hollywood Legion Stadium for the I.B.C., through his relationship with Edward Underwood. When Carbo's and Palermo's telephonic threats and Sica's and Dragna's ominous visits had failed to bring Leonard and Nesseth "into line", Gibson and Daly flew to Los Angeles together to apply more subtle pressures to Leonard. While Gibson was applying financial pressure to Leonard, Daly, acting out his traditional role of everybody's friend and nobody's enemy, attempted to convince Leonard that it was useless to fight the I.B.C.-Carbo combination. One of his brainwashing sessions with Leonard was recorded on May 14, 1959, at the Ambassador Hotel. Daly's remarks during this 2½ hour meeting reveal a very clever effort by Daly to convince Leonard of Carbo's ultimate power. In bloody detail, Daly described the beating of Ray Arcel in terms which indicate his contempt for Arcel's desire to operate a boxing promotion free of payoffs to Carbo. [Exs. 100-102, 176, 101-A for Ident. at pp. 32-34.]

Although Daly denied seeing or talking to Carbo for over a year, prior to May 1959 [21 R.T. 3101-3102; 22 R.T. 3245-3246], his recorded admissions to Leonard [Exs. 100-102, 176, 101-A for Ident.] coupled with a telephone toll slip [Ex. 30] conclusively establish that he spoke to Carbo (and probably Palermo) approximately seven hours before he boarded a commercial jet airplane with Gibson to fly to Los Angeles on May 11, 1959. [Exs. 156, 157, 158, 159.] Daly told Leonard on May 14, 1959, while referring to Carbo: "He's furious. I told him I wasn't coming out here 'til Wednesday, but he wanted me to meet him Sunday night. This is about quarter after one in the morning." [Exs. 100-102, 176, 101-A for Ident. at p. 24.] Exhibit 30 reflects that a station-to-station direct-distance-dialing call was made from Daly's residence in Englewood, New Jersey, at 1:42 a.m., May 11, 1959. This call lasted 10 minutes. The receiving number of this call, Hilltop 9-1585, was the telephone at the residence of Mrs. Margaret Dougherty in Upper Darby, Pennsylvania, which, Palermo admitted, was used by him. [39 R.T. 5850-5852.] Daly continued as follows:

"I wouldn't have got in—which I've often went out—ain't got no tails on you at that hour, but we used to meet around three or four in the morning and—which I didn't want to drive about 40 or 50 miles, and they have to drive 40 or 50 miles from where they were. I got out by saying I'm not going to do anything. But he found out, how the fuck he found out, he said, maybe from Jim Norris, I don't know. You know—

Leonard—Yeah, you came out with Truman.

Daly—Yeah, left about nine o'clock that morning. But Truman was all upset with the bout over the phone. Said, 'Get myself in this fucking jackpot. . . .'" [Exs. 100-102, 176, 101-A for Ident. at p. 24.]

Later, Daly told Leonard about calling Carbo and Palermo at Palermo's "Hilltop number back where they were," thereby connecting this conversation to the May 11 toll slip. [Exs. 100-102, 176, 101-A for Ident. at p. 46.]

Exhibit 167, a map of New Jersey and Pennsylvania, reflects that the approximate distance from Englewood, New Jersey, to Upper Darby, Pennsylvania is 100 miles. This corroborates the fact that Daly was talking about getting together with Carbo and Palermo on the night of May 11, 1959, by each driving half way from his house to the house of the other for a secret meeting. Of course, secrecy was necessitated, in part, by the fact that Carbo was then a fugitive from New York County, a fact which was concealed from the jury in the playing of Exhibits 102 and 176, by stipulation of the prosecution and defense.

Further evidence of the conspiratorial plan of Carbo and Palermo aimed at Leonard is the testimony of the New York detective, Frank Marrone, who discovered Carbo in New Jersey on the night of May 29, 1959, in a private residence. The only other person present when Marrone entered the house was Palermo's brother-in-law, Alfred Cori. In Cori's possession was a facsimile of the one thousand dollar Western Union money order [Ex. 59] sent by Palermo in the misspelled name

of "Daley" in December, 1958, so that Leonard could fly to Miami to be confronted by Carbo. [43 R.T. 6503-6504.]

Daly admitted, during cross-examination, that Gibson told him he was in trouble with Palermo and Carbo. [22 R.T. 3278-3279; 23 R.T. 3392-3399.] Daly admitted that he testified before the Grand Jury, in September, 1959, as follows:

"A. . . . And I told him he was a fool for even dealing with them in the beginning, he had no right to, I avoided them all my life. Jackie Leonard will tell you the exact words, 'You have no right to deal with them. Once you deal with them you are hooked.'

Q. That is exactly what you told him? A. Yes sir, I told him any number of times, Leonard." [23 R.T. 3379-3380.]

Particular attention should be paid to the telephone chart [Appendix A] since it collects documentary evidence, which in many cases is evidence collateral to the testimony of Leonard and Nesseth. It provides a chronological framework for the development of the conspiracy. Special note should be paid to April 29, 1959, the day after the threatening calls from Carbo and Palermo. On that day Gibson received four calls from Palermo, and probably Carbo, and called the Hollywood Legion Stadium four times as well. [5 R.T. 683-684; 32 R.T. 4693; 43 R.T. 6520; Exs. 39, 23, 25, 24, 40, 44, 41 and 42.] The sequence of the calls, and the fact that several were to Gibson's home late at night is noteworthy. Late on the night of May 4, 1959 (on the same afternoon during which Palermo

and Dragna were intimidating Leonard at his office), Gibson telephoned Palermo under Palermo's alias, George Tobias, and spoke with him for 12½ minutes. [Ex. 34.]

The Court's attention is also respectfully directed to the schematic representation of the conspiracy, below. [Appendix B.]

(c) *Synopsis of Proof of Membership of Each Appellant in the Conspiracies Charged, Exclusive of Extra-Judicial Acts and Declarations of Co-conspirators.*

Appellants contend that appellee has not produced sufficient evidence to establish membership in the conspiracy, but that, if this has been accomplished, it has been done only by use of extra-judicial acts and declarations of co-conspirators against each other. Although the Statement of Facts, above, demonstrates that appellants' contention is without merit, we propose to summarize *some* of the evidence given against each appellant, *excluding* extra-judicial acts and declarations of any other conspirator.

(1) PAUL JOHN CARBO:

On January 6, 1959, Leonard was moved by Palermo from the Blue Mist Motel across the street to the Chateau Resort Motel, and while having breakfast in the coffee shop, Abe Sands ("Mike" or "Sandy") escorted Carbo into the coffee shop. [5 R.T. 637-639.] Carbo told Leonard that he had missed Norris (who Leonard had expected to see) and that he, Carbo, would handle it. Carbo took Leonard, Palermo, and Sands into the hotel room and made numerous demands re-

specting Leonard's ability to control Nesseseth and Nesseseth's fighter, Don Jordan (then welterweight champion). [5 R.T. 639-640.] Demands were made concerning a Jordan-Hart fight. [5 R.T. 640.] Palermo explained, in Carbo's presence, how they obtained control of Hart. Carbo stated that he wanted Palermo to get his percentage to keep him out of his (Carbo's) pocket. [5 R.T. 640.] Carbo repeatedly insisted that Leonard control Nesseseth and Jordan. [5 R.T. 642-646.] Carbo ordered Leonard not to leave the motel room, even to take a walk. [5 R.T. 642-643.] (John DeJohn had expected to see Norris in Miami that same month, and he was chauffeured along with Carmen Basilio, to a house where he was confronted, not by Norris, but by Carbo. The chauffeur was "Sandy". [44 R.T. 6574-6576; 20 R.T. 2833-2837.])

On January 27, 1959, pursuant to instructions to call "Frank at the Palermo Hotel back east", Leonard telephoned one of the numbers provided to him by Palermo. [5 R.T. 651, 656; 13 R.T. 1796, Ex. 13.] After being reprimanded by Palermo for not sending 15 percent of Jordan's purse in the Jordan-Gutierrez fight, Carbo took the telephone and warned Leonard and Nesseseth that he had friends on the West Coast who would do his bidding if the money was not sent immediately. Leonard identified Carbo's voice. [5 R.T. 658-659.] (Although Leonard sent the check to "Clare Cori" on February 6, his fear was such that he dated it January 27, the date of the Carbo threat. [5 R.T. 663-665; Exs. 53, 54 and 55.])

On April 28, 1959, Leonard received a telephone call from Carbo who said he was going to have Leonard killed; that he had controlled the welterweight title for

25 years; that he was going to have somebody in California take care of Leonard and Nesseth. Leonard identified Carbo's voice (Nesseth was with Leonard when he received the call and saw Leonard turn white and vomit). [5 R.T. 680-681; 13 R.T. 1819.] A few minutes after the Carbo call, Palermo telephoned. [Exs. 21 and 22 reflect the two calls were from the Cori home in Philadelphia.] John DeJohn saw Carbo and Palermo together in a Philadelphia residence in April or May of 1959. [44 R.T. 6574-6578.] Carbo was with Palermo's brother-in-law, Alfred Cori, in a private residence in New Jersey, a short distance from Philadelphia, on May 30, 1959, at which time Cori had in his possession a facsimile of a \$1,000 money order sent by Palermo to Leonard in the name of "William Daley." [43 R.T. 6498-6510, and see also 40 R.T. 6078-6079.]

Carbo received at least \$40,000 from an I.B.C. subsidiary, Nevill Advertising Agency, in the form of checks drawn to the order of Viola Masters, his wife (during the period 1954-1957). The payments were arranged by Gibson. [32 R.T. 4767-4773.] Carbo "held trial" for Leonard at the Palmer House in Chicago in March, 1958, in the presence of Al Weill, because Leonard was not giving preference to Weill fighters (evidence of common scheme and prior similar acts). [12 R.T. 1669-1673.]

In March, 1958, Carbo and Palermo were together in Washington, D. C. Carbo ordered Palermo to call the telephone number of Lou Viscusi in Houston, Texas. Viscusi was the manager of lightweight champion, Joe Brown. Carbo told Palermo to use the name of "Mr.

Frank.” (The same name used to set up the threatening call of January 27, 1959.) Palermo reported to Carbo that he, Palermo, demanded \$2,000, and that the recipient of the call, presumably Viscusi, was frightened. Carbo joined the telephone conversation (evidence of common scheme and plan). [15 R.T. 2258; 37 R.T. 5458-5461, 5481; 16 R.T. 2328-2331; 33 R.T. 4943-4946.]

In April 1958, Carbo congratulated Gibson upon his election as President of the I.B.C. [30 R.T. 4517.] After the State Athletic Commission hearing in May, 1959, Carbo questioned Gibson about Leonard’s testimony at the hearing, and told Gibson that Palermo had never entered Leonard’s office. [33 R.T. 4932-4935.] Carbo and Gibson had met in Gibson’s room at the Roosevelt Hotel in New York in January, 1958. One of the subjects discussed was Virgil Akins, soon to become welterweight champion. Akins’ manager, Bernard Glickman (called as a defense witness), admitted transmitting \$10,000 in currency to Carbo without a receipt. The money was delivered to him by “Mike” (Abe Sands or Sandy). [32 R.T. 4773-4778; 29 R.T. 4270-4271.]

(2) FRANK “BLINKY” PALERMO:

On October 23, 1958, the morning after the Jordan-Ortega re-match, Gibson telephoned Palermo at the Bismarck Hotel in Chicago. [5 R.T. 592; 30 R.T. 4456-4461; Exs. 86-D, 86-C.] Shortly thereafter, while Gibson was with Leonard and Nesselth at the Olympic Auditorium, discussing the forthcoming championship fight between Jordan and Akins, Gibson received a telephone call from Palermo and then gave the telephone

to Leonard. [5 R.T. 599-600; 30 R.T. 4455-4456.] Palermo told Leonard that "we", presumably he and Carbo, were in for one-half of the fighter, or there would not be any fight, and that Leonard should talk to Gibson about it and call him back at the Bismarck Hotel. [5 R.T. 601-604.] After meeting with Gibson, Leonard telephoned Palermo at the Bismarck Hotel in Chicago. Palermo told Leonard he would call him back from a pay phone. [12 R.T. 1762-1763; 14 R.T. 2062; 5 R.T. 605; Exs. 2, 3, 4, and 72; 4 R.T. 421-429.] Palermo wanted assurance that Leonard could handle Nesseth and Jordan, and that Gibson had said everything would be all right. Palermo again threatened that unless Leonard could control the situation, they (meaning Palermo and Carbo) were going to pull the fight, and that there would be no fight unless Nesseth gave up one-half of the fighter. [5 R.T. 605-607.] Between October 23 and December 5, 1958, Palermo called Leonard several times demanding assurance that Nesseth was under control. [5 R.T. 617.] Palermo told Gibson in Chicago, during this period, that he, Palermo, had a part of Jordan's contract. [30 R.T. 4839-4844, 4846.]

Palermo induced Leonard to fly to Miami, Florida, ostensibly for the purpose of meeting with James D. Norris. [5 R.T. 622-623; 6 R.T. 846-847; 13 R.T. 1784-1785.] Shortly before Christmas, Palermo telephoned Leonard and told him that he had spoken to Daly (an unindicted co-conspirator) and that money would be sent to Leonard. [5 R.T. 623-624.] On December 23, 1958, Leonard received a \$1,000 Western Union money order purchased in Philadelphia. The purchaser was recorded as "William Daley". [Ex. 82.]

Palermo again insisted on Leonard flying to Miami, telling him that he had \$1,000, and that he, Palermo, had sent the money order. [5 R.T. 625.] On January 5, 1959, Leonard flew to Miami where he was met by Palermo and Abe Sands ("Mike" or "Sandy"). Palermo took Leonard to the Blue Mist Motel where Palermo was registered as George Tobias, 1620 Wood Street, Carbondale, Pa. (false name and address). Palermo promised Leonard that early the next morning they would see Norris and "some people." [5 R.T. 630, 635, 637; 18 R.T. 2629; Ex. 50; 17 R.T. 2558-2564; Exs. 107-A, 107-B and 107-C.]

The following morning Palermo told Leonard that they were moving to a neighboring motel, the Chateau Resort Motel. Palermo registered as Lew Gross, 1620 Wood Street, Lehigh County, Pa. (false name and address). [5 R.T. 638-639; 17 R.T. 2567-2568; Exs. 109-A, 109-B, 108-A, 108-B.] At breakfast, Abe Sands ("Mike" or "Sandy") escorted Carbo into the coffee shop. Thereafter, Carbo made various statements and uttered various threats in Palermo's presence. (Set forth in detail above, under Carbo, and in the Statement of Facts.) After Leonard returned to Los Angeles, he received various telephone calls from Palermo and Carbo, checking on whether Leonard had Nesseth under control. [5 R.T. 647.]

Palermo had ordered Leonard to send 15 per cent of Jordan's purse (one-half the manager's share) to Palermo care of Clare Cori at an address in Philadelphia. Palermo admitted that Clare Cori was his wife. [5 R.T. 648-649; Ex. 52; 39 R.T. 5827.] (Note that Carbo had previously received payments in his wife's

maiden name, just as Palermo was doing on this occasion.) On January 27, 1959, after the Jordan-Gutierrez fight, Leonard received a message to call Frank at the Palermo hotel back east. Thereafter, he telephoned Palermo at one of the numbers provided for this purpose. [5 R.T. 656; 13 R.T. 1796; Ex. 13.] During this conversation, Palermo angrily told Leonard to stop stalling and send the money, and then gave the telephone to Carbo who proceeded to threatened Leonard in the manner set forth above. [5 R.T. 657-659.]

On February 6, 1959, Leonard mailed \$1,725.00 to "Clare Cori", as instructed by Palermo, at a Philadelphia address. This check was later cashed in Florida with the fictitious indorsement "Carmen Cosara" appearing thereon. The proceeds of the check were delivered to Palermo. [5 R.T. 663-665; Exs. 53, 54, 58, 110-A, 110-B, 110-C, 124; 21 R.T. 3011-3018, 3020-3024; 17 R.T. 2570-2572.] Palermo contended at the trial that the money represented repayment of a loan, but his income tax return for 1959 recorded it as income received from "Jackie Leonard for business promotion and services rendered." [40 R.T. 5969-5970; 44 R.T. 6307-6308, 6620-6626, 6629-6636, 6644-6645; Exs. 53, 170, 171, 172, and 174.] Palermo cursed Leonard for sending a check. [5 R.T. 670-671.]

Palermo wanted Leonard to be in St. Louis with Nesseth for the second Jordan-Akins title fight, and again pressed Leonard about a Jordan-Hart fight, saying that if Leonard and Nesseth did not go all the way with Carbo and Palermo, they would not get any help. [5 R.T. 672-676.] After the second Jordan-Akins fight Palermo and Glickman, Akins' manager, went to the promoter's office where Glickman asked about 15 per

cent of the purse, mentioning that Nesseth or Jordan owed some money. Palermo asked if Leonard had left some money. [18 R.T. 2601-2602.] Later that morning, Palermo asked Gibson to go to see Nesseth with him. [31 R.T. 4617-4618.] Palermo went to Nesseth's room at the Kingsway Hotel where Palermo demanded money from him. When Nesseth told him he was not going to pay off, Palermo said "'some mighty big people were going to be unhappy about it.'" Two witnesses, aside from Nesseth, testified that when Palermo left the room, he said "the man isn't going to like this." [13 R.T. 1809-1813; 15 R.T. 1225; 16 R.T. 2325.]

Thereafter, Palermo telephoned Leonard and threatened him because of Nesseth's failure to have the money [5 R.T. 676-677], and later that same day again telephoned Leonard threatening that he was going to get into a lot of trouble with people back East. [5 R.T. 678.] On April 28, 1959, Leonard received the telephone call from Carbo (referred to above in the section on Carbo) involving death threats. A few minutes after the Carbo call, Palermo telephoned Leonard, telling him that Carbo was right, that Leonard was a double-crosser, and that he, Palermo, "was going to see some people that were going to see" him. Nesseth was present. [5 R.T. 681-682; 13 R.T. 1827-1828.] (Telephone toll slips reflects the two calls; Palermo's call coming 4½ minutes after Carbo's. See Statement of Facts, above, and Exs. 21 and 22.) John De-John saw Carbo and Palermo together in Philadelphia in April or May of 1959. [44 R.T. 6576-6578.] On April 29, Palermo telephoned Gibson, collect. [Exs. 23, 32.] On April 30, Palermo checked into the Bismarck Hotel, charging his stay to I.B.C., care of Gibson.

[12 R.T. 1731-1732, 1739-1740; Exs. 70, 71.] Palermo frequently charged his stays at the Bismarck Hotel to Gibson's firm. [40 R.T. 6002.] Palermo met with Gibson and Sugar Hart's manager in the lobby of the Bismarck Hotel on May 1, and that same day, Palermo called Philadelphia (to the same telephone used by Carbo and Palermo on January 27 and April 28 to threaten Leonard and Nesseth). Palermo also telephoned the Hollywood Legion Stadium (where Leonard's office was located). [12 R.T. 1731-1732, 1739-1740; Exs. 70 and 71; 40 R.T. 6002; 31 R.T. 4641-4643; Exs. 74 and 76.]

On May 1, 1959, Palermo flew to Los Angeles without checking out of the Bismarck Hotel. The events transpiring thereafter are set forth in great detail in the Statement of Facts, as well as in other sections of this brief.

During the period May 1, 1959, through May 6, 1959, Palermo carried out Carbo's threat to use West Coast contacts. Palermo registered at the Beverly Hilton Hotel under the name of George Tobias on May 1. That evening he met with Dragna. On May 2 or 3, Palermo met with Sica and later that same day Palermo and Sica threatened Leonard. On May 4, Palermo and Dragna went to Leonard's office at the Hollywood Legion Stadium and had a conversation with Leonard, during which Leonard was warned about his conduct. Shortly after midnight, May 4, Palermo received a telephone call from Gibson under his alias, "George Tobias". On May 6, Sica and Palermo met with Leonard and Nesseth at the Hollywood Legion Stadium where Palermo, among other things, expressed concern

over the fact that the St. Louis Police knew about his visit with Nesseth after the Jordan-Akins fight in St. Louis. (See the Statement of Facts, above, for a detailed description of this meeting.)

On May 6, Palermo denied to the Los Angeles Police Department that he ever heard of Dragna, asserted that he had not seen any of the Sicas during that particular trip to Los Angeles, and said that he knew the Sicas only to say hello to. [42 R.T. 6212-6218.] On May 15, 1959, Palermo received \$9,000 from Gibson in Chicago. Although according to the books of Chicago Stadium Corporation, \$4,000 of this was intended for fighter Johnny Saxton, who was in a mental hospital, it was recorded, along with the remaining \$5,000 as ordinary income in Palermo's tax return. [35 R.T. 4949-4955; 34 R.T. 4999-5001; 40 R.T. 6080-6083; 44 R.T. 6620-6625, 6629-6634; Exs. 133, 170, 171, 172, 173 and 174.]

(3) TRUMAN K. GIBSON, Jr.:

On October 23, 1958, the morning after the Jordan-Ortega rematch and before leaving for the Olympic Auditorium, Gibson telephoned Leonard's home and then placed a call to Palermo at the Bismarck Hotel in Chicago. [5 R.T. 592; 30 R.T. 4456-4461; Exs. 86-C, 86-D.] Shortly after arriving at the Olympic Auditorium, Gibson received a telephone call from Palermo and handed the telephone to Leonard. [5 R.T. 599-600; 30 R.T. 4455-4456.] When Leonard told Gibson that Palermo had demanded a piece of Jordan's contract, Gibson replied that he should have mentioned this to Leonard earlier, but he had been too busy. (Corroborated by Palermo's remarks on May 6, when Paler-

mo, in the presence of Sica, asserted that Gibson had wanted to handle Leonard and Nesseseth.) [5 R.T. 602; 12 R.T. 1756-1758.] Later that same day, Gibson met with Leonard, Nesseseth and McCoy at the Ambassador Hotel. Gibson told his visitors that unless they went along with Palermo and Carbo, they would pull Akins (managed by Glickman) and cancel the fight. Gibson said, “[G]o along with it . . . it has been done before. That is the way the welterweight and lightweight titles have been run since Carbo and Blinky has gotten into the picture.” Gibson made it clear that “‘the only way that Jordan was going to get a title fight, was to go along with this thing, that Mr. Palermo had proposed, to cut the fighter in half.’” Finally, Gibson told Leonard to go to the telephone and call Palermo. [5 R.T. 603-604; 12 R.T. 1757-1760.]

Gibson said it was very important to him that Leonard and Nesseseth submit to the Palermo-Carbo demands because he (Gibson) did not want either of them to interfere with the title fight (which was scheduled for national television on December 5, 1958). [32 R.T. 4780-4781.] Gibson repeatedly assured Leonard and Nesseseth that he would take care of any money that was involved [5 R.T. 617-618; 12 R.T. 1760-1761; 30 R.T. 4473-4476], and that there would not be any violence. When Nesseseth and Leonard told Gibson, before the December 5 title fight, that they were going to tell Palermo about Nesseseth’s decision not to give up any part of his contract with Jordan, Gibson insisted that they should not make such a telephone call. [13 R.T. 1783.] Palermo telephoned Gibson in Chicago and advised Gibson that he had a part of Jordan’s contract. [33 R.T. 4851.]

Following are examples of Gibson's flagrant conduct revealing the true nature of his association with his co-conspirators and his consciousness of guilt with respect to this relationship:

(a) Payments to Carbo by the I.B.C. subsidiary Nevill Advertising Agency, under the name of "Viola Masters," because this looked better on their books than Carbo's name. [32 R.T. 4763-4773.]

(b) Gibson's false entry with respect to the payment of \$1,800 to Jack Leonard as "an advance" on the Porterville promotion when Gibson knew this was intended for Palermo. [5 R.T. 660-661.] Moreover, Gibson, inconsistent with his own entry, told Ogilvie, bookkeeper at the Legion Stadium, that the \$1,800 should be made payable to *cash* and was for "a friend." [33 R.T. 4894; 15 R.T. 2140-2141.]

(c) Two checks, totalling \$9,000, drawn to the order of "Frank Palermo" on May 15, 1959, nine days after Palermo's exploits in Los Angeles with Sica and Dragna. The bookkeeping entries in connection with these checks are palpably false and Gibson's explanations are incredible. (See the Statement of Facts, above, for a full explanation.)

(d) Gibson's letter to George Parnassus, dated October 28, 1958, in which Gibson sets forth the subordinate role of Leonard in the Hollywood Boxing and Wrestling Club. Gibson's statements in this letter are directly contrary to the impression Gibson had conveyed to the State Athletic Commission in order to obtain its approval of the new boxing club. [28 R.T. 4181-4183.]

The following is a partial list of admissions by Gibson given during his testimony at the trial:

(a) That it was the policy of the corporation of which he was the operating head (I.B.C.), to use the underworld to the extent that it could in the operation of its business. [34 R.T. 5050.]

(b) That the purpose in using the underworld was to prevent fixed fights, to put on fights that would please the sponsors and the public, to maintain a free flow of fighters without interference, without strikes, without sudden illnesses, without sudden postponements; that this was preventive action. [35 R.T. 5127, 5130-5136.]

(c) That when Gibson used the underworld to achieve his ends, he was not aware of the means that were being used on his behalf. [35 R.T. 5138.]

(d) That he had a telephone conversation with Palermo on April 29, 1959, the day before Palermo flew from Pennsylvania to Chicago, en route to Los Angeles, at the outset of the critical period of the conspiracy (May 1 to May 6, 1959). [31 R.T. 4640; Ex. 23.] (In fact he had three more calls from Palermo that day: Exs. 39, 25, 24.)

(e) That he and Palermo were working toward the same objective: a Hart-Jordan fight. [32 R.T. 4696-4697.]

(f) That he told Palermo to get out of Los Angeles during a person-to-person telephone call from Gibson to "George Tobias". [32 R.T. 4694-4697; Ex. 34.]

(g) That on May 3, 1959, during the course of a telephone conversation with Leonard and Nesseth, he

told the victims that he, Gibson, would save the Hollywood Boxing and Wrestling Club if Nesseth would agree to sign his fighter for a title fight with Sugar Hart; that this was the only alternative Leonard had to going out of business (the very same alternative was offered by Palermo and Sica at the Beverly Hilton Hotel on May 2 or 3, and on May 6 at the Hollywood Legion Stadium). Gibson said, among other things, "*now you got one chance, as I see it, and that is a Sugar Hart Championship fight. . . .*" [32 R.T. 4688-4689.]

(h) That he was neither concerned nor indignant when Palermo bragged to him of his (Palermo's) interest in Jordan's contract (in Chicago, in November, 1958 [33 R.T. 4851]), even though Leonard had expressed his fear of Palermo to Gibson on a previous occasion (October 23, 1958), and said he was afraid "something might happen to me." [33 R.T. 4849.] Nor was Gibson concerned in January, 1959 [33 R.T. 4889; 34 R.T. 4978-4979], or in May 1959, when Leonard complained of the threats. Gibson did not care and he told Leonard and Nesseth, on May 3, in the wake of Carbo's death threats, that they would get no sympathy from him. [32 R.T. 4684-4692.] Gibson's attitude is reflected in the following testimony given by him during the trial:

"Q. Well, what had Mr. Palermo done, so far as you knew, to earn a share or a part of Mr. Jordan's contract? A. I neither knew nor cared, Mr. Goldstein.

Q. You didn't care, did you? A. No, I did not." [33 R.T. 4851-4852.]

With respect to (h), above, it is interesting to note that Leonard's expression of fear to Gibson on January 27, 1959, was provoked when Gibson told Leonard that Palermo was trying to contact him (Leonard). Hours later, on the very same day, Leonard was threatened by both Palermo and Carbo during the January 27 telephone call referred to above. The May 2, 1959, plea to Gibson was within a week of Carbo's April 28, 1959, death threat over the telephone. The October 23, 1958, protest to Gibson was an aftermath of Palermo's demand for half of Jordan. Yet, Gibson, according to his own testimony, did nothing to obstruct or interfere with Palermo or Carbo, despite his acknowledged relationship with both. To the contrary, Gibson used his own, more subtle threats to coerce Leonard and Nesseth to submit to the Carbo-Palermo demands.

On or about May 5, 1959, Gibson telephoned Daly in New York and arranged to meet Daly in Los Angeles to handle the crisis at the Legion Stadium (note that this is at the very time Palermo was exerting pressure through use of Sica and Dragna). [32 R.T. 4662-4663.] Gibson flew from New York to Los Angeles with Daly on May 11, 1959, and both registered at the Ambassador Hotel. [Exs. 150-160, 166; 32 R.T. 4662-4663.]

Gibson had met with Carbo in his room at the Hotel Roosevelt in New York the year before, and one of the subjects discussed was Virgil Akins, about to become welterweight champion. [32 R.T. 4758.] When Gibson was elected President of the I.B.C., in April, 1958, Carbo telephoned his congratulations. [30 R.T. 4517.]

After the State Athletic Commission hearing on May 20, 1959, which exposed the conspiracy, Carbo telephoned Gibson to inquire about Leonard's testimony. [33 R.T. 4932-4935.]

(4) LOUIS TOM DRAGNA:

Dragna met with Palermo at Puccini's Restaurant on the evening of May 1, 1959, the day Palermo arrived in Los Angeles. [38 R.T. 5615-5616; 40 R.T. 6030-6037.] Dragna admitted that Palermo suggested that he, Dragna, contact Leonard. [38 R.T. 5618-5619.] Palermo told Dragna that the purpose of his coming to Los Angeles concerned Sugar Hart. Dragna told Palermo to telephone him on May 4, and provided Palermo with a telephone number. [38 R.T. 5666-5667.]

On May 4, 1959, Dragna entered Leonard's office with Palermo. Nesseth left the room when he saw Dragna. [6 R.T. 728.] Dragna listened to Palermo's diatribe about Leonard having double-crossed the appellants with respect to the control of Jordan. Palermo said, " 'He even had to tell the gray man he was going to get 15 percent' " and Dragna added: " 'Well, you are wrong there, Jackie.' " Dragna told Leonard he was dealing with big people. Palermo told Leonard, in Dragna's presence, to get hold of Don Nesseth and straighten this thing out. It was explained to Leonard that the pressure would be removed if Nesseth agreed to have Jordan defend his title against Sugar Hart. Dragna asked Leonard if Nesseth did not live out his way, and Leonard, attempting to mislead Dragna, said that Nesseth lived near San Bernardino. Dragna, knowingly, said that Nesseth lived in West Covina. Then

Dragna pointedly inquired: “ ‘He has a wife and kids, doesn’t he?’ ” Palermo began screaming about Nesseth, and Dragna said: “ ‘You are right in the middle of this thing, Jack’ And he said: ‘You better try to get it straightened out or,’ he says, ‘you can be in a lot of trouble.’ ” [6 R.T. 728-732.] Dragna asserted, in the course of the session that “he was acquainted with these people.” (Referring to the Carbo group.) [12 R.T. 1700.]

(5) JOSEPH SICA:

On May 2 or 3, 1959, Sica, in response to a telephone call from Palermo (at Sica’s unlisted telephone: [36 R.T. 5377]) went to the Beverly Hilton Hotel. [36 R.T. 5316-5317.] According to Sica, Palermo asked him to contact Leonard and he (Sica) agreed to do this. [36 R.T. 5317-5318.] Sica testified that he telephoned Leonard. Leonard’s testimony was that the call was from Palermo. [6 R.T. 720; 36 R.T. 4984-4988; 40 R.T. 6030.] In any event, when Leonard arrived at the hotel, he found Sica *and* Palermo waiting for him. He was taken to Palermo’s room and threatened a number of times. He was told that he and Nesseth were in serious trouble and that he (Leonard) could get hurt. Sica offered to accompany Leonard to use force on Nesseth. [5 R.T. 686-692.] Sica also told Leonard that he (Leonard) had his head in a noose, and that the only way he could get out was to grab Nesseth and shake him and make him agree to the Hart fight. [6 R.T. 733.]

On the evening of May 4, Leonard received a call from Palermo and Sica, asking him to meet with Sica, Dragna, and George Raft to try to straighten out the

problem. [6 R.T. 736-737.] On the morning of May 6, when Leonard arrived at his office at the Hollywood Legion Stadium, Sica was waiting for him. Sica wanted to know if Leonard had contacted Nesseth and solved the problem. [6 R.T. 738-739.] Sica examined Leonard's office, the walls and ceiling thereof, as if looking for a concealed listening device. [6 R.T. 745-766; 13 R.T. 1848-1849; 17 R.T. 2457-2458.] Thereafter, Sica left and returned shortly with Palermo.

The conversation that ensued among Palermo, Sica, Nesseth, Leonard and McCoy, was recorded by the Los Angeles Police Department. It is fully described in the Statement of Facts, above. [Exs. 96, 97, 96-A for Ident.] During the meeting, Sica evidenced actual knowledge of the events which had transpired before his overt entry into the conspiracy. Sica told Leonard he was on the spot, and he castigated Leonard for double-crossing Carbo and Palermo. As Palermo and Sica left the meeting, Sica leaned over and whispered to Leonard, "'Jackie, you're it.'" [6 R.T. 745.] Nesseth observed Sica lean over and say something to Leonard, although he did not hear what it was. [13 R.T. 1849-1850.]

Sica's explanation at the trial for being in Leonard's office that morning was that he wanted to find out why Leonard had not shown up at Perino's Restaurant the night before. [37 R.T. 5495-5498.]

The jury rejected this. The following is Sica's testimony concerning his May 6 appearance at the Legion stadium:

"Q. What was your purpose in going by the Stadium the next day? A. Just to find out why he hadn't showed up at the appointment.

Q. What did you care? A. Usually when I make appointments with someone, Mr. Goldstein, I keep my appointments and a lot of times I wonder what happens to the other fellow that hasn't kept his appointment.

Q. You don't like it when people stand you up, is that it? A. I wouldn't say I don't like it. I don't particularly care for it.

Q. Is that why you went to the Legion the next morning? A. No, I wanted to find out what happened to Leonard, he hadn't shown up.

Q. You had your dinner, didn't you? A. Yes, I did, and enjoyed it too.

Q. What did you care what happened to him? A. Well, I just wanted to know why he hadn't shown up. He told me twice he would be there and he kept us hanging.

Q. Apparently he just didn't want to show up, wouldn't you say that? A. I don't know whether he didn't want to show up or not. I would say it was possibly because his wife hadn't got back in time, as he had said that morning.

Q. What possible difference would that make to you on the following day, Mr. Sica? A. I wouldn't know how to answer that." [37 R.T. 5498-5499.]

Shortly after Sica left the May 6 meeting, he had Willie Ginsberg telephone Manuel Dros, Leonard's assistant matchmaker. Dros was told to call Sica from a public telephone booth. When Dros reached Sica at the number provided to him by Ginsberg, he was told by Sica that he (Dros), was working for the wrong people (meaning Leonard). Sica said that he wanted

to contact Don Chargin (who was investing money in Leonard's failing business). Dros said he would try to locate Chargin. However, when Sica called Dros at his home later on for this information, Dros told him he could not find Chargin. [15 R.T. 2204-2206, 2210; 37 R.T. 5559-5564; 15 R.T. 2207.] On June 4, 1959, Chargin received an anonymous telephone call in Oakland. He was to leave the following day for Los Angeles and the caller warned Chargin that he knew his flight number and that he should stay out of Hollywood or he would get what Leonard got. (Leonard had been the recent victim of a beating.) [20 R.T. 2882; 43 R.T. 6358.]

Although Sica's testimony at the trial is too lengthy to repeat in this summary, a reading of it will reveal that he made numerous damaging admissions. An example of his testimony is set forth above. Among other things, Sica admitted that he told Leonard that he "was on the spot." [37 R.T. 5511.]

(d) *In General.*

The summaries of evidence against individual appellants and the Statement of Facts above show the *express knowledge* of all appellants with respect to the criminal nature of their participation in the conspiracy. There are also numerous facts and circumstances from which one can infer the requisite knowledge and intent:

"There is informed and interested cooperation, stimulation, instigation. . . . In such a posture the case does not fall doubtfully outside either the shadowy border between lawful cooperation and criminal association or the no less elusive

line which separates conspiracy from overlapping forms of criminal cooperation.”

Direct Sales Co. v. United States, 319 U. S. 703, 713 (1942).

It is interesting to note the extent of participation required by the Supreme Court in its analysis of the knowledge and intent questions. Direct Sales Co. was a drug manufacturer conducting a large mail order business which included the sale of morphine to a licensed physician in South Carolina. The volume of sales was such that Direct Sales Co. should have known the physician was dispensing the drugs illegally. “The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latters’ inherent capacity for harm and from the very fact they are restricted, makes a difference in the *quantity of proof required to show knowledge. . . .*” [Emphasis supplied.]

Direct Sales Co. v. United States, *supra*, at p. 711.

Since the illegal character of the transaction was inherent in the product itself, knowledge by Direct Sales Co. of the illegal activity by the physician was inferred. “While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist.” [*id.*, distinguishing *United States v. Falcone*, 311 U. S. 205 (1940).] (In the *Falcone* case harmless commodities were involved, and their sale to a bootlegger, even in quantity, could not

be said to imply knowledge by the seller of the lawful activity by the bootlegger in that case.)

The analogy to be drawn with the facts in the instant case seems apparent. All of the appellants, including Gibson, Sica, and Dragna, were dealing in an illegal commodity. They were applying pressure to Nesseth, through Leonard, in order to obtain Nesseth's property, with his consent, induced by the wrongful use of threatened force, violence and fear.

18 U. S. C. §1951.

All of the appellants were aware of one fundamental fact: *Nesseth did not want to give up any part of Jordan's contract to anyone. He did not want them as partners and the conspirators were trying to force themselves upon him.* As Nesseth testified:

"... [I]n the proper light, I was just a businessman that had a piece of property and nobody offered to buy it, they just wanted to take it away from me." [13 R.T. 1898.]

Naturally the appellants urge upon the Court the argument that there was no formal agreement among them with respect to Leonard and Nesseth and that, insofar as Sica and Dragna are concerned, they were victims of circumstance who were only trying to do a favor for Palermo. As the Supreme Court said in *Direct Sales Co., supra*, at page 714:

"Not the form or manner in which the understanding is made, but the fact of its existence and the further one of making it effective by overt conduct are the crucial matters. *The proof, by the very nature of the crime, must be circum-*

stantial and therefore inferential to an extent varying with the conditions under which the crime may be committed." [Emphasis supplied.]

Even if Sica and Dragna had stood silently by while Palermo did all the talking, the jury would be entitled to infer, under all the circumstances, that they had joined the conspiracy and were acting in furtherance thereof.

Anderson v. United States, 262 F. 2d 764, 711 (8 Cir. 1959).

In *United States v. Manton*, 107 F. 2d 834 (2 Cir. 1938), *cert. den.* 309 U. S. 664 (1940), the Second Circuit discussed the sufficiency of evidence against the defendant Manton. With two Associate Justices of the Supreme Court (Sutherland and Stone) sitting as Circuit Justices along with Circuit Judge Clark, the court observed that:

"It is true that Manton denied all incriminating testimony, and that, in the main, the evidence tending to show Manton's partnership in the conspiracy came from the lips of convicted co-conspirators and other witnesses of bad or dubious character. Indeed, in a case like this, it is unlikely that it would be otherwise. But the credibility of these witnesses and the weight to be given their testimony, as we have already said, were questions for the jury and are matters beyond the scope of judicial review. Moreover, the record contains a mass of documentary evidence—accounts, cancelled checks, promissory notes, etc.—not only corroborative of the oral testimony, but adding independent strength to the government's case."

United States v. Manton, supra, at p. 843.

Consideration of this holding of the Second Circuit in *Manton* is helpful in analyzing the instant case. The court points out that there are a number of “significant” circumstances which bolstered the Government’s case. Seven of these are set forth in the opinion and each concerns evidence of an incriminating relationship among conspirators to be found in the instant case. It is not that they do things together (guilt by association) that persuades the court of their nefarious purpose; it is *what they do together*. The “long and friendly relations between Fallon and Manton”; gratuitous introductions; telephone conversations; suspicious financial transactions including loans made at Manton’s request—all of these, taken together with other evidence “disclose a state of affairs so plainly at variance with the claim of Manton’s innocence as to make the verdict of the jury unassailable. *The circumstances taken together amply sustain that conclusion.*” [Emphasis supplied.]

United States v. Manton, supra, at pp. 843-844.

In *Manton*, as in the case at bar, there were late comers to the conspiracy. The court dealt separately with one of these, appellant Spector:

“It is not required that each of the conspirators shall participate in, or have knowledge of, all the operations. He may join at any point in its progress and be held responsible for all that may or has been done.”

Id. at pp. 848-849.

The court found sufficient evidence to warrant a jury finding that Spector was a member of the conspiracy. The analogy between Spector’s conduct in *Manton* and

the conduct of Gibson, Sica, and Dragna in the instant case is irresistible. Spector acted as an “intermediary”; he made efforts to conceal the true character of certain financial transactions and altogether conducted himself in an unorthodox and devious fashion. The court held, with respect to Spector, that:

“Taken in connection with other evidence, it is hard to explain these devices upon any other theory than that they were adopted to conceal the real facts and to aid in the consummation of the criminal conspiracy. Certainly they are not the accompaniments of honest business. The circumstances of secrecy, intrigue and deviousness, and the attempts to conceal the real nature of the transactions, which the evidence discloses, are hallmarks of fraud and dishonesty, justifying the jury’s conclusion that a criminal conspiracy existed . . . and that Spector knowingly became a party to that conspiracy. . . . *In a case like this, it is enough that a convicted defendant knew he had connected himself with a criminal conspiracy, even though he was unaware of its full extent.*” [Emphasis supplied.]

Id. at pp. 848-849.

Whether or not any one or more of the appellants was aware of, or participated in, all aspects of the conspiracy is irrelevant.

“. . . ‘It is enough if a man, understanding that there is a crowd banded together to break the law, knowing in a general way what the purposes of the crowd are in that respect, becomes a member of it and acts with them to a greater or lesser extent. . . . *Where a conspiracy is established,*

but slight evidence connecting a defendant therewith may still be substantial, and if so, sufficient.’”

[Emphasis supplied.]

McDonald v. United States, 89 F. 2d 128, 138-139 (8 Cir. 1937).

Before concluding this section, a word should be said about appellant Gibson's role in the conspiracy. His was the more subtle part, one which he played with cunning. The record is clear that the wedding of Gibson's interests to those of Carbo was not thrust upon Gibson by Carbo. It was, above all else, a wedding of convenience, sought after as much by one party as the other. Gibson was not a victim of the underworld infiltration of boxing. He welcomed it. He nurtured it. He profited by it. That Gibson understood the sinister and criminal implications of his relationship with Carbo and Palermo is directly proven by the evidence which includes his eagerness to conceal payments to Carbo through the establishment of a fictitious employment relationship with Carbo's wife whereby he paid her under her maiden name. Who would know that Viola Masters was, in reality, Mrs. Frank Carbo? Although Gibson never personally threatened violence, he did threaten economic harm and his whole approach to the problem, as expressed to Leonard and Nesseth *and to the jury on the witness stand during the trial*, reveals amoral conduct of one nonchalantly unconcerned with means, so long as his ends, to wit, profits and monopoly power, were realized. [See the schematic representation of the conspiracy, below: Appendix B.]

“. . . That being true, a jury might have found that all the accused were embarked upon a ven-

ture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned, was dependent upon the success of the whole.”

United States v. Bruno, 105 F. 2d 921, 922 (2 Cir. 1939), *rvsd.* on other grounds, 308 U. S. 287 (1939).

In conclusion, we are drawn inexorably to the case of *Krulewitch v. United States*, 336 U. S. 440 (1949), and particularly to the concurring opinion of Mr. Justice Jackson. Of course, *Krulewitch* was prosecuted upon a tenuous theory which invited the sentiments expressed by Mr. Justice Jackson. There is no analogy to be found in *Krulewitch*, in either fact or theory, to the instant case. Although the argument of appellants in the instant case, which is predicated upon *Krulewitch*, may have an emotional appeal, even this effect vanishes when the *holding* of *Krulewitch* is compared with the facts of this case.

For the instant case discloses all the evil inherent in a partnership in crime and, in itself, provides the rationale for treating conspiracy as a separate crime in the catalogue of criminal conduct. [See Mr. Justice Frankfurter’s statement concerning the extreme danger of a criminal conspiracy in *Callanan v. United States*, 364 U. S. 587, 593-594 (1961).]

In *Rex v. Meyrick & Ribuffi*, 21 Crim. App. Reports 94 (1929), the Lord Chief Justice of England, affirming a conspiracy conviction, wrote as follows:

“The attention of the Court has been directed to a well-known passage in which judicial remark

was made upon the unfairness that flows from the inclusion of a count for conspiracy in an indictment in which there ought to be no such count. The unfairness in such a case is, of course, manifest. *But the criticism has no relation at all to a case where the circumstances are such as to call for the inclusion of a count for conspiracy, and to call for it in the public interest for the due administration of justice.*”

4. Electronic Recordings Were Lawfully Received Into Evidence.

Three appellants object to the admission into evidence of certain electronic recordings which constituted unimpeachable corroboration of the testimony of the victims Leonard, Nesseth, and McCoy. These recordings fall into two categories. Palermo and Carbo urge that it was error to admit a telephone tape recording [Ex. 177] of a conversation between Palermo and Leonard, made by the Los Angeles Police Department with Leonard's permission. [Palermo's Op. Br. 5-6, 11-13; Carbo's Op. Br. 35-37, 63-64.] Carbo and Gibson contend that the recordings of a conversation between co-conspirator Daly and Leonard are inadmissible. [Exs. 100-102, 176, 101-A for Ident.; Carbo's Op. Br. 5, 14-16, 62-63; Gibson's Op. Br. 52.] These two recorded conversations will be treated separately.

(a) *The Palermo-Leonard Telephone Call—Exhibit 177.*

On the evening of May 5, 1959, Palermo telephoned Leonard at his home and attempted to persuade Leonard to come to Perino's Restaurant where Palermo and Sica were waiting for him. Palermo told Leonard

that he had been contacted by Carbo and that he and Leonard had to place a telephone call to Gibson. [Ex. 177.] The entire conversation was recorded by Leonard with the aid of a detective of the Los Angeles Police Department who attached an electrical induction coil to Leonard's telephone receiver in his home. The tape recording machine picked up the conversation from the telephone receiver via the induction coil. [44 R.T. 6708-6711.]

It ill behooves Palermo to contend, as he does, that the recording) and playing of this tape recording during the trial) was a violation of the Federal Communications Act. 49 U. S. C. §605. If it were a violation of that statute for one party to a conversation to record it on his own telephone without the knowledge of the other party to the conversation (who called him), Palermo and his trial counsel would be guilty of violating that statute. Their Exhibits C, D, and E are recordings of telephone conversations between Palermo and Leonard, made by Palermo without Leonard's knowledge or permission.

We submit, however, that it is not a violation of Section 605 to make a recording of a telephone call under such circumstances. There is no rational distinction, in terms of the policy of that statute, between a recording made via an induction coil attached to the receive, being used by a party to the conversation, and the testimony of a third person to what he heard via an extension telephone, with the sole permission of the party at his end of the wire. The latter circumstances have been held not to violate the statute in an extortion case brought under 18 U. S. C. §875(b).

Rathbun v. United States, 355 U. S. 107 (1957).

In *Rathbun*, the Supreme Court construed Section 605 in a sensible fashion and, we submit, resolved the question presented herein:

“ . . . The clear inference is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it. . . .”

Rathbun v. United States, supra, at p. 110.

However, the precise question raised here has been settled in the Fifth Circuit against the appellant, and the Supreme Court denied a writ of certiorari on the question earlier this year.

Carnes v. United States, 295 F. 2d 598 (5 Cir. 1962), *cert. den.* 369 U. S. 861 (April 23, 1962).

In *Carnes*, the Fifth Circuit carefully analyzed the entire history of cases under Section 605 in order to determine if an “interception” occurred within the meaning of the statute, when a party to the conversation used an induction coil to record the call without obtaining the permission of the other party:

“ . . . Taking a sensible view of it, the only difference between a person testifying to a conversation which he participated in or overheard and a recording of the conversation is that the recording has the advantage of furnishing trustworthy evi-

dence (assuming a showing that the tape has not been tampered with).”

Carnes v. United States, supra, at p. 602.

Cf. State v. Carbone, 31 L. W. 2029 (Supreme Ct. of N. J., Decided June 29, 1962, per Weintraub, C. J.);

People v. Malotte, 46 Cal. 2d 59, 292 P. 2d 517 (1956) (per Traynor, J.)

(b) *The Daly-Leonard Tape Recordings—Exhibits 100, 101, 102, and 176.*

Carbo and Gibson seek to invalidate the unimpeachable corroboration of Leonard's testimony concerning Daly's threats in behalf of Carbo and Gibson: the two independently recorded tapes of the session in Daly's room at the Ambassador Hotel in Los Angeles, May 14, 1959. [Exs. 100, 176.] Exhibit 100 is a wire recording made on a Minifon, a miniature recording device, concealed on Leonard's person. Exhibit 101 is a filtered copy of Exhibit 100 and Exhibit 102 is a filtered and edited copy thereof. Exhibit 176 is a tape recording of the same two hour conversation, recorded not by Leonard in Daly's room, however, but in a neighboring room by Sergeant Keeler of the Los Angeles Police Department through a radio receiver tuned to a miniature radio transmitter also concealed on Leonard's person.

Appellants contend that Exhibit 100 (as well as the exhibits copied from it: Exs. 101 and 102) was inadmissible because it was allegedly created in violation of the Fourth Amendment. They assert that Leonard obtained access to Daly's hotel room under false pre-

tenses, thereby violating *somebody's* right to be free from an unreasonable search, although it is unclear who that *somebody* is. Appellants are forced to concede in connection with their argument that the law of this Circuit is squarely against them.

Todisco v. United States, 298 F. 2d 208, 210 (9 Cir. 1961), *cert. den.* 368 U. S. 989 (1962).

However, by attempting to introduce the practice of psychoanalysis into the already complicated practice of the law, appellants urge this Court to overrule its decision before the first anniversary of its announcement, on the *authority* of their frustrated hopes about what the Supreme Court might have held—but did not—in the recent “spike mike” case.

Silverman v. United States, 365 U. S. 505, 508-510 (1961).

Despite appellants' theory about the changed philosophies of the Justices, the Supreme Court was presented with an opportunity to reject its prior holding in *On Lee v. United States*, 343 U. S. 747 (1951), and to adopt a right of privacy interpretation of the Fourth Amendment, in contradistinction to the traditional trespass to property theory. The Court faced the choice in *Silverman* and chose not to expand the Fourth Amendment into a federal right of privacy.

In addition to the *stare decisis* hurdle which appellants face, they are also confronted with another difficult question: whose constitutional rights are they asserting? Certainly not their own. The sole tenant of the hotel room was Daly. If any of the appellants had a joint interest in the premises—whether legal, equit-

able, or possessory—they failed to prove it below. Since they never had an interest therein, surely they are in no better position to suggest their standing to complain of Leonard's recording activities than Colonel Abel had standing to complain of the F.B.I.'s search of his espionage headquarters in Brooklyn. Though Abel had been checked out of his hotel room in federal custody, he had no standing to complain of the physical search and seizure in his residence. Appellants can hardly complain of a recording of Daly's threats to Leonard made by Leonard in a hotel room which they had never checked into.

Abel v. United States, 362 U. S. 217, 240-241 (1960);

Eberhart v. United States, 262 F. 2d 421, 422, fn. 1 (9 Cir. 1958).

Putting to one side the absence of standing of any appellant to urge this point, we submit that there is no point on the merits to urge. Even if *On Lee* goes as far as the Supreme Court is willing to go in sustaining surreptitious recordings by agents of the Government of face to face conversations with criminal conspirators, the scope of lawful recording is more than adequate to validate Exhibits 100, 101, and 102. Leonard was one of the victims of a vicious extortion plot. He did not ask Daly if he could come to talk with him. Daly threatened him with the wrath of Carbo and Gibson the previous day at the Legion Stadium, then *told* Leonard to come to his hotel room the following morning to continue the discussion. [6 R.T. 751-754.] Since Leonard was specifically ordered to see Daly in his hotel room, his right to be there (as an extortion vic-

tim) is certainly as clear as the right of a member of the general public to enter a laundry.

Cf. On Lee v. United States, supra.

Appellants are unwilling to identify Daly's purposes on May 14, 1959, with their own, but they are eager to identify his supposed constitutional rights with their own. However, no rights of Daly were infringed by Leonard, so there are no rights to which appellants can attach themselves with any profit.

Appellants are in even more troubled waters when they attempt to suppress the other recording of the same conversation made via the radio transmitter concealed upon Leonard's person. [Ex. 176.] This recording was offered by appellee during its rebuttal case for the sole purpose of proving *beyond a reasonable doubt* that Gibson's defense witness and co-conspirator, William Daly, was a perjurer. During Gibson's case, Daly attempted to discredit Leonard by clouding the authenticity of the Minifon wire recording [Ex. 100] made by Leonard. Daly testified that Leonard had omitted from the recording ten separate and distinct portions of their conversation of May 14, 1959. The suggestion of the defense was that Leonard had turned the Minifon's switch off whenever the conversation touched upon subjects embarrassing to Leonard. Clearly Daly never suspected that Leonard's clothing concealed a radio transmitter as well as a wire recorder that morning, or he would never have dared to take the witness stand and commit such cavalier and premeditated perjury. [23 R.T. 3285-3319.]

Thus, Exhibit 176 became a classic rebuttal exhibit, in that its sole function was to prove that a defense

witness had lied about a material matter; and it proved that fact to a moral certainty. The conversation contained upon it is identical with the conversation recorded on Exhibit 100, except for a gap of approximately 45 seconds when Sergeant Keeler turned the tape reel [Ex. 176] over. The switch on the radio transmitter was taped open so that Leonard could not conveniently shut it off in Daly's presence. Sergeant Keeler also monitored the entire conversation via the radio receiver while he was recording Exhibit 176. Leonard omitted *nothing* from Exhibit 100. [16 R.T. 2339-2341; 44 R.T. 6695-6703.]

Appellants make the specious contention that Exhibit 176 was inadmissible because Leonard operated the radio transmitter in violation of the Federal Communications Act. From this, they argue, the exhibit is tainted and should have been excluded. This argument is without merit for the following four reasons:

(1) Leonard was not the operator of the radio transmitter in any meaningful sense of the term. The transmitter was strapped to his body by the Los Angeles Police Department and the switch was taped in the "on" position. He never turned the switch off. Nor could he change the frequency of the transmitter, since it was *crystal-tuned* to the same frequency as the receiver in Sergeant Keeler's custody. [V C.T. 1324-1325.] Thus, Leonard was, at most, a mobile platform for the transmitter, not the operator of it.

(2) The transmitter was licensed by the Federal Communications Commission for use by the Los Angeles Police Department, which was the operator of the radio strapped to Leonard's body. [V C.T. 1324-1325.]

(3) Whether or not the transmitter was operated in violation of the station-licensing provisions of the Federal Communications Act, the recording made through the radio is not excludible from evidence. The purpose of the licensing features of the Federal Communications Act is to avoid “jamming” of the electromagnetic spectrum, not to guarantee rights of privacy to any person. Thus, violation of such provisions will not be punished by the federal courts through exclusion of evidence *transmitted* (not *intercepted*) in violation of the law.

Todisco v. United States, supra, at p. 211.

(4) Assuming such evidence were obtained in violation of the Federal Communications Act, further assuming that evidence so obtained violated the rights of Daly (the only non-consenting party to the conversation recorded), and finally assuming that such evidence would ordinarily be excluded for these reasons—still, Exhibit 176 would be received on the facts of this case. This is true because Exhibit 176 is evidence which exposes perjury by the witness whose supposed rights are violated. Although illegally obtained evidence might not be admissible on the Government’s case-in-chief, it becomes admissible to reveal a fraud upon the court when that fraud is perpetrated by the person who initially had standing to prevent the receipt of such exhibit into evidence.

Walder v. United States, 347 U. S. 62, 65 (1954).

5. Evidence That Leonard Relayed the Threats of the Conspirators to Other Victims of the Extortion Scheme Was Properly Admitted.

Carbo asserts that victims Nesseth and McCoy should not have been permitted to testify to the substance of threatening conversations between the conspirators and Leonard, relayed to them by Leonard. [Carbo's Op. Br. 17-19, 65.] The stated ground for the contention that it was error to receive this testimony is that it constituted *hearsay*. In each of the instances cited by Carbo in which Nesseth or McCoy testified to statements by Leonard, the declaration by Leonard was either a report of a threatening occurrence (either a meeting or telephone call) with one or more of the appellants, or a message intended by one or more of the appellants to be transmitted to Nesseth: either a threat or a demand for a meeting with him.

All of this testimony was properly received for several reasons:

(a) Leonard was used by the appellants as a conduit of threats intended by the appellants for Jordan's managers, Nesseth and McCoy. [See *e.g.* 13 R.T. 1823-1824, 1842.] For the purpose of these messages, Leonard was a talking agent of appellants. No hearsay danger is involved since the declarant (Leonard) testified to the original event (the call or meeting with the conspirators) and was subject to cross-examination thereon *before* Nesseth or McCoy corroborated Leonard's testimony that he had communicated the threats to them.

(b) Since fear in the minds of the victims is a necessary element in an extortion case, evidence circum-

stantially establishing this state of mind is competent, material, and relevant. It is settled law in prosecutions under the Hobbs Act that the courts must receive testimony of conversations among the extortion victims which tends to establish this element.

“ . . . Evidence of Wedaa’s conversation with Gilligan, a fellow company executive, was admissible for its bearing on the state of mind of the company officials who paid the money. . . .”

United States v. Varlack, 225 F. 2d 665, 673 (2 Cir. 1955).

See also:

United States v. Kennedy, 291 F. 2d 457 (2 Cir. 1961);

Nick v. United States, 122 F. 2d 660, 671-672 (8 Cir. 1941), *cert. den.* 314 U. S. 687, *reh. den.* 314 U. S. 715 (1941);

United States v. Stirone, 168 F. Supp. 490, 497 (W. D. Pa. 1957), affirmed 262 F. 2d 571 (3 Cir. 1959), *rvsd.* on other grounds, 361 U. S. 212 (1960).

(c) Finally, the testimony of Nesselth and McCoy was proper corroboration of Leonard’s testimony of threatening calls and meetings with appellants. Leonard was subjected to cross-examination by appellants for more than five days upon every aspect of his direct testimony, which had consumed approximately one and one-half days. [R.T., Volumes 5, 6, 8, 9, 10, 11, and 12.] A considerable portion of this cross-examination was aimed at discrediting Leonard’s testimony by questioning him about apparent inconsistencies between his

direct examination and his earlier statements to the Los Angeles Police Department [Ex. 64 for Ident.], the Federal Bureau of Investigation [Exs. 60 for Ident. —63 for Ident.], and the California State Athletic Commission [Ex. 65 for Ident.]. The theory implicit in appellants' cross-examination of Leonard was that he had recently fabricated his testimony in order to "frame" the five appellants by describing statements and acts attributed to them covering the period from October 23, 1958, to some time after the indictment in the fall of 1959, which statements and acts allegedly never occurred.

In this context, after Leonard had completed his testimony, Nesseth and McCoy were called to corroborate the essential framework of Leonard's story. In many instances, each of which Carbo now urges as error, Nesseth and McCoy recalled that Leonard had recounted the threatening events at or about the time Leonard testified (in court) that they had occurred in substantially the way Leonard related them to the court and jury. In each of the examples cited by Carbo in his seventh specification of error, Leonard's reports to Nesseth and McCoy were made while the conspiracy was still evolving and before Nesseth had made his first report to the Los Angeles Police Department.

Thus, Leonard's statements to Nesseth and McCoy were clearly admissible as prior consistent statements of a witness made prior to a time when he had a motive to fabricate. Such statements are received, after cross-examination of the declarant, as circumstantial corroboration of his courtroom testimony.

Judge Learned Hand recognized and applied this rule in a racketeering case many years ago:

“ . . . It is well settled that, when the veracity of a witness is subject to challenge because of a motive to fabricate, it is competent to put in evidence statements made by him consistent with what he says on the stand, made before the motive arose. The common sense of such a rule has been too strong for the formal objection that the evidence is hearsay, and indeed the objection is in substance not good anyway, since the witness is by hypothesis there to be cross examined. . . .”

Di Carlo v. United States, 6 F. 2d 364, 366 (2 Cir. 1925), *cert. den.* 268 U. S. 706 (1925).

Cf. Lindsey v. United States, 237 F. 2d 893, 895 (9 Cir. 1956).

Thus, for two distinct reasons, the declarations of Leonard to Nesseth and McCoy were *not* hearsay within the traditional meaning of that concept. They were properly received.

6. Anonymous Telephone Threats to Leonard and Chargin.

Carbo and Sica complain that the district court erred in admitting testimony concerning certain anonymous threatening telephone calls received by Leonard and Chargin, after all five appellants had made direct threats to Leonard and Nesseth, and during the period of the conspiracy. [Carbo's Op. Br. 19-21; Sica's Op. Br. 37-38, 68-72.]

(a) *Anonymous Telephone Threats to Leonard.*

On direct examination Leonard was not asked to testify about any telephone calls in which he could not

identify the other party or parties to the call. On cross-examination, the defense sought to impeach Leonard by playing portions of Exhibit E, a tape recording made by Palermo of two telephone conversations with Leonard which transpired after the return of the indictment. Appellants used this recording to argue to the jury that Leonard was attempting to “frame” them with false testimony. [47 R.T. 7082-7084; 48 R.T. 7232-7233, 7274-7275, 7387.]

To meet this inference, appellee questioned Leonard on redirect examination to establish that the reason Leonard had finally agreed to accept money from the appellants, in order to be able to leave the country with his wife and child, was that he and his wife could not continue to live in fear for their lives. [12 R.T. 1659-1667.] After the extortion plot became public knowledge on May 20, 1959 (when the California State Athletic Commission held its precipitous public hearing), Leonard began to receive telephone calls which intensified his fear that reprisals would be taken against him for his testimony. Although these threats were brutal and related to Leonard’s testimony against the appellants [see the section concerning denial of bail during trial and the affidavits of Leonard and Jeanne Blakely filed in connection with the bail hearing during trial: III C.T. 533-537], appellee did not question Leonard about the contents of the calls in the jury’s presence.

It is clear that where the defense seeks to raise an inference that the Government’s witness is lying and that his testimony is a step in his attempt to extort money from the defendants, it is proper, on redirect examination, to establish the true facts concerning *the witness’ state of mind* (his motivation) when he ex-

pressed a willingness to accept money, previously offered to him by the defense, for his silence. [6 R.T. 765.] If it is proper cross-examination to attempt to show by *circumstantial* evidence that the witness had a criminal intent, as appellants sought to do here, it would be an odd rule of law that *direct* evidence of his lawful intent would be inadmissible on redirect examination.

However, the law is not so odd. The trial judge properly allowed the prosecution to rebut the false inference that the witness had concocted a plan to “frame” the appellants.

Bracey v. United States, 142 F. 2d 85, 89-90
(D. C. Cir. 1944), *cert. den.* 322 U. S. 762.

(b) *Anonymous Telephone Threat to Chargin.*

During the months of April and May, 1959, while the appellants and their associates were threatening the lives of Leonard and Nesselth and simultaneously attempting (by financial pressure) to drive Leonard out of the boxing business, Leonard was negotiating with Don Chargin, the boxing promoter in Oakland, California, and Chargin's friend, Harvey Livingston, an automobile tire dealer from Hayward, California, to obtain capital with which to save the Hollywood Boxing and Wrestling Club from bankruptcy.

Immediately after Sica left Leonard's office on May 6, 1959, having whispered in Leonard's ear, “‘Jackie, you're it,’ ” Sica took steps to contact Leonard's assistant matchmaker, Manuel Dros, asked Dros how to contact Chargin, and warned Dros that he “was working for the wrong people.” [6 R.T. 745; 15 R.T. 2204-2206.]

On May 14, 1959, Daly explained to Leonard what had become obvious to him: that the appellants would bring every kind of pressure to bear upon him in order to force Nesseth "into line", including threats to the potential investors who might save the Club from extinction:

"Daly: What does he want to do with the joint? What have you done? Have you got a deal out there?

Leonard: I don't think we got a deal. I'll know today. Chargin was supposed to come in last night. He didn't come. He's not coming 'til today.

Daly: And he's—

Leonard: And now Joe Sica wants to see him. He's liable to screw the—it all up. I don't know.

Daly: Does Sica know Don?

Leonard: No. He read it in the paper yesterday or something. And right away he wanted to get a hold of Chargin to—

Daly: Does he know Livingston?

Leonard: No.

Daly: They'll find out who Livingston—

Leonard: Oh, yeah, they've checked him already. They've sent some cars up north, trying to find out where they can locate him and who he is. Try to put the—try to scare him away, you know.

Daly: *Oh, they'll get somebody up around San Francisco to go see him, and tell him to lay off you people. . . . [Unintelligible] You know. So it'll make the guy think a little bit, too, you know.*

Leonard: 25, 30, 40 thousand—a guy is going to stop and think you know.

Daly: *Yeah, and the guy's going to say, 'Look, we don't want your money to be hurt, but we'll fuck that club up every way we can.' All over a fucking nitwit like Don Nesseth. You can't talk to Nesseth? He won't listen?'* [Exs. 100-102, 176, 101-A for Ident. at pp. 49-50. Emphasis supplied.]

Chargin planned to come to Los Angeles on June 5, 1959. On June 4, while in Oakland, California, he received an anonymous telephone call:

“[T]he call stated to stay out of Hollywood and that they knew my flight number and, also, that ‘You saw what happened to Jack Leonard,’ and that was—then the party hung up.” [15 R.T. 2236-2237, 2239.]

Sica contends that the trial court should not have allowed Chargin to testify to this typical second installment in an extortion plot. He tacitly admits that he knew where Chargin could be reached in Oakland, but asserts that his prior contact with Chargin was completely legitimate. [Sica's Op. Br. 70-72.] This erroneously assumes that the jury believed Sica's testimony rather than the tape recording of co-conspirator Daly. It also assumes that the jury saw nothing incriminating in the surreptitious manner in which Sica contacted Dros in order to find out when Chargin was coming to Los Angeles, right after threatening Leonard for refusing the demands of Carbo and Palermo. Sica certainly fails to establish that the trial judge erred when he concluded that the circumstances of Sica's and Daly's prior threats to Leonard, in the

context of the over-all conspiratorial plan to destroy Leonard and Nesseth, justified admitting Chargin's testimony that he received exactly the type of threat that Daly warned Leonard would be forthcoming to Chargin. In an attempted extortion case in New York, the appellate court held:

"[I]t seems to me that it was a material fact to be proved that an explosion, which was just what the defendant had threatened, actually took place shortly afterwards and the result of which attempted to make effective the threat which was made. As a fact which would tend to throw light upon the intent of the defendant in making the threat it seems to me that this testimony was entirely competent. Whether it is called part of the *res gestae* or an independent fact which has probative force in proving that the defendant attempted to commit the crime of extortion on the afternoon of December ninth, it is not material to determine. My view of it is that it was a fact which in itself tended to prove that the defendant did make a threat on the afternoon of December ninth for the purpose of extorting money from the complainant and that the explosion followed as the natural result of the refusal of the complainant to comply with the defendant's demands.

"The principle upon which I consider this testimony admissible is stated by the learned author of Wigmore on Evidence (§105) as follows: 'Where one threatens to do an injury to another and that or a similar injury afterwards happens,

this furnishes ground to presume that he who threatened the fact was the perpetrator or instigator.' . . ."

People v. Vitusky, 155 App. Div. 139, 152-153, 140 N. Y. Supp. 24, 29 (1st Dept. 1913);

Cf. People v. Dioguardi, 8 N. Y. 2d 260, 168 N. E. 2d 683 (1960).

7. Evidence of Prior Similar Acts by Certain Appellants and Evidence to Show Carbo's Whereabouts During the Period of the Conspiracy Was Properly Admitted to Show Motive, Intent, and Scheme, and to Corroborate the Direct Evidence of Extortion.

Carbo presents a potpourri of items which he says should not have been received against him, claiming these items were irrelevant and prejudicial. [Carbo's Op. Br. 22, 77-78, fn. 9.] Only one of the occurrences which Carbo claims, in his argument, to be irrelevant is included in a specification of error. That is Leonard's testimony, on redirect examination, concerning a *command performance* which he endured at Carbo's direction on March 25, 1958, at a Chicago hotel. The entire transaction was injected into the case not by the prosecution, but by Carbo, who now complains because he finds he has been hoist with his own petard.

Counsel for Carbo opened the matter up by asking Leonard about a session at the Palmer House in Chicago in March, 1958, in which Carbo, Ralph Gambina, and Al Weill participated. He suggested to Leonard that Leonard made an offer to Carbo to give Carbo half of all his fighters if Carbo would allow the lightweight champion, Joe Brown, to fight an un-

identified opponent. Leonard denied that he had made such an unlikely offer, pointing out that he was a matchmaker at the time and did not manage a single fighter. [10 R.T. 1456-1457.] Carbo never offered any evidence which even tended to contradict this denial. Then, Carbo waived cross-examination of Gambina when Gambina admitted his presence at such a meeting. Gambina had been called as a witness by Sica. [16 R.T. 2390-2394, line 1; 2406.]

Since Carbo had generated some heat but shed no light upon the matter on Leonard's cross-examination, the prosecution properly asked Leonard, on redirect examination, what the true contents of the conversation were.

When Leonard was asked to relate the conversation, Carbo's counsel objected:

“[I]t is incompetent irrelevant and immaterial, and it calls for a conclusion of the witness.”
[12 R.T. 1671-1672.]

None of these grounds is good. Carbo has abandoned all but *irrelevancy* in his Opening Brief. If the conversation was irrelevant to prove any issue in the case, it was improper cross-examination of the same witness by counsel for Carbo; however, Carbo does not admit such error. Leonard's answer to the question was no doubt *prejudicial* to Carbo in the sense that Judge Learned Hand used the term in the *Compagna* case when he justified the reception of certain evidence which “prejudiced” the defendant Kaufman.

United States v. Compagna, 146 F. 2d 524, 530 (2 Cir. 1944), *cert. den.* 324 U. S. 867, *reh. den.* 325 U. S. 892 (1945).

The substance of the testimony was that James Norris told Leonard that Carbo wanted to see him. Leonard asked Gibson where he could locate Carbo. Gibson replied that he did not know where Carbo was staying in Chicago, but assured Leonard that he would receive a telephone call informing him where to go. The call came. It was from Al Weill who picked Leonard up and took him to a room at another hotel where they met Gambina and Carbo. [12 R.T. 1669-1671a.]

Carbo put Leonard "on trial", as it were, for failing to match a sufficient number of Weill's fighters at the Hollywood Legion Stadium. Carbo stated that "he had made a lot of money with Weill," and that Weill was working in conjunction with Gambina. Thus, Leonard's *orders* were to use both Weill's and Gambina's fighters more frequently:

"I told him that if they fit I would use them and otherwise I didn't want to use them. And he said, 'Whether they fit or not, I have made a lot of money with Weill and you better use those fighters.'" [12 R.T. 1672-1673.]

Carbo was shouting at Leonard in the course of his lecture. [12 R.T. 1673.]

It is difficult to understand how such an incident, first opened up by Carbo, could be irrelevant, when it tends to prove that Carbo had made extortive demands upon Leonard, seven months before he had Palermo make the unlawful demand upon Leonard on October 23, 1958, which was calculated to maintain his control of the welterweight title. The incident certainly illuminates Carbo's intent when he subsequently threatened Leonard's life and livelihood at the clandestine meet-

ing in Miami and in his telephonic threats to Leonard one year later. The common theme is Carbo's attempt to force Leonard to aid him in maintaining his illicit dominion over boxing.

Bush v. United States, 267 F. 2d 483, 489 (9 Cir. 1959);

Schino v. United States, 209 F. 2d 67, 74 (9 Cir. 1954), *cert. den.* 347 U. S. 937 (1954).

This evidence performs a function in this case which is even more pertinent than evidence of prior similar acts, which evidence is admissible standing alone. The March, 1958 incident is additional evidence that appellants Gibson and Carbo had confederated on occasions prior to the time that Jordan became the top welterweight contender, when Carbo desired to apply pressure to Leonard. Note that it was Gibson and Norris who acted as Carbo's messengers to invite Leonard to Carbo's "trial" at the Palmer House. As Judge Learned Hand held in the trial of the principal Communist Party conspirators:

" . . . There can be no logical reason for limiting evidence to prove that the defendants were in a conspiracy between 1945 and 1948 to the period of the charge; if they were in the conspiracy earlier, declarations of any one of them or of any other person acting in concert with them are as competent as those made within the period laid. Whether they are relevant depends upon how far they form a rational support for believing that the conspiracy continued to 1945; but it is nonsense to say that events occurring before a crime, can have no relevance to the conclusion

that the crime was committed; and declarations are no different from any other evidence. How far back of the commission of the crime one may go is a matter within the general control of the judge over the relevancy of evidence. . . .”

United States v. Dennis, 183 F. 2d 201, 231 (2 Cir. 1950), affirmed 341 U. S. 494 (1951).

The rest of the shotgun blast contained in Carbo's tenth argument [Carbo's Op. Br. 77-78, fn. 9] under the label of irrelevancies is not even covered by a specification of error. However, they will be quickly answered.

Carmen Basilio's testimony was offered to establish two facts pertinent to the case. It demonstrated that Carbo was in Miami during January, 1959, thus corroborating Leonard's testimony that he saw Carbo with Palermo in the Chateau Resort Motel in Miami on January 6, 1959. The second function of Basilio's testimony was to show a similar act, evidence of Carbo's *modus operandi*, in arranging meetings so that the other party would not know that he was about to be confronted by Carbo. Basilio and his manager, John DeJohn, received a telephone call to come to James Norris' house. They were picked up by a chauffeur who they thought had the name "Sandy." (Leonard was picked up at the Miami airport by Palermo and a man whose true name was Abe Sands. Sands also brought Carbo to the motel.) When Basilio and DeJohn arrived at their destination, just like Leonard, they were greeted by Carbo rather than Norris. [44 R.T. 6574-6576; 20 R.T. 2833-2837; 5 R.T. 624, 630, 635; 18 R.T. 2629; Ex. 50.]

The question of Carbo's secret monopoly of the welterweight title, no matter who temporarily wore the crown, was central to the motivation and scheme of the conspiracy charged in the indictment. The reason Carbo and his co-conspirators threatened Leonard and Nesseth was because Carbo saw Nesseth questioning his claim to manage secretly whomever was the champion. Therefore, evidence that Carbo had exercised *de facto*, though not *de jure*, managerial control over the welterweight champion who was ousted from the championship by Don Jordan, was excellent circumstantial evidence of Carbo's ability and motive to tell Leonard, quite authoritatively, through Palermo that "‘We are in for half the fighter or there won't be any fight.’" [5 R.T. 601-602.] Evidence that Akins' manager of record, Bernard Glickman, saw fit to discuss Akins with Carbo during 1957 and early 1958 (when Akins became champion) was evidence of such *de facto* control. [29 R.T. 4259-4260.] Glickman's \$10,000 "loan" to Carbo, in the form of currency, without any evidence of indebtedness to protect him, was additional circumstantial corroboration of Carbo's control of Glickman. [29 R.T. 4270-4271.] More corroboration of Leonard was supplied by the testimony of Glickman that the \$10,000 in currency was picked up from him by a Carbo messenger who identified himself as "Mike." Abe Sands was also identified to Leonard as "Mike" when he met Leonard at the Miami airport. [5 R.T. 630.]

The rebuttal testimony of New York Police Department Detective Frank Marrone proved two material facts. First, it established that Carbo was in the Philadelphia vicinity a month after his April 28, 1959,

telephone threats to Leonard from the Cori residence in Philadelphia. (John DeJohn provided further corroboration of this fact when he testified that he saw Carbo and Palermo together in an unidentified private house in Philadelphia in April or May, 1959 [44 R.T. 6574-6578].) Second, it provided circumstantial corroboration of the fact that Carbo's and Palermo's plan to extort money from Jordan's managers initially included an attempt to win Leonard's confidence by sending him a \$1,000 Western Union money order which enabled him to come to the Miami meeting. A facsimile of this money order, which had been sent by Palermo to Leonard before Christmas, 1958, in Daly's name (misspelled), was found by Marrone in the possession of Palermo's brother-in-law, Alfred Cori. Cori was discovered with this document alone in the house with Carbo after midnight, ten days after Leonard had testified about the extortion plot at the public hearing. Cori's incredible explanation, made in Carbo's presence, for being at this private home in New Jersey, after midnight, was that he had come to do the gardening! [43 R.T. 6498-6510.]

Detective Anthony Bernhard's experiences at Goldie Ahern's Restaurant in Washington, D. C., on the night of March 19, 1958, was another excellent example of evidence of common scheme and plan as well as additional evidence of Carbo's control of Akins' manager, Glickman. A third function of this proof was its circumstantial corroboration of the fact that Palermo and Sica were knowing co-conspirators with Carbo, as well as another employee of the I.B.C., Billy Brown.

Bernhard overheard Carbo and Palermo discuss a telephone call which Carbo had Palermo make to a

telephone number in Houston, Texas, assigned to Lou Viscusi, manager of the then lightweight champion, Joe Brown. Carbo had Palermo demand "two grand right away" in this call. Seated at the table during the discussion of this unlawful demand was Billy Brown who was the I.B.C.'s matchmaker at Madison Square Garden. [43 R.T. 6511-6521; 14 R.T. 1971; 15 R.T. 2258.] The significance for this case to be found in the fact that Carbo controlled the manager of the lightweight champion, just as he controlled the manager of the welterweight champion in 1958, is that Sica told Harvey Livingston, manager of top contending lightweight Johnny Gonsalves, that he would try to arrange a title fight between Gonsalves and Brown. The price would be \$1,000 expense money and the understanding that Livingston would give up fifteen per cent of the fighter to an unidentified person located in Miami (where Leonard saw Carbo apparently residing in an apartment [5 R.T. 645-646].) Since Brown's manager lived in Houston, Texas, and Sica said the arrangements for such a fight had to be made in Miami, and since the price of a chance to fight for the title was the same fifteen per cent that was demanded by Carbo and Palermo from Jordan's purses [5 R.T. 665], it seems clear that Sica was acting as Carbo's shake-down emissary *in loco Palermo*. [16 R.T. 2331.]

Bernhard also overheard discussion between Carbo and Palermo about a dinner for "Jim" which he wanted to attend. The reference probably was to a dinner involving James Norris of the I.B.C. Carbo told Palermo that he would be able to attend it. Three days later, Detective Bernhard observed Palermo outside the Walnut Room of the Bismarck Hotel in Chicago where

a Ring Dinner was being held. [43 R.T. 6524-6526.] On the dais were Gibson, Norris, Carmen Basilio, and Bernard Glickman. [44 R.T. 6546-6548, 6550-6551.]

Finally, Bernhard overheard Carbo tell Palermo and the others at the table:

“ . . . ‘I have troubles—I got this trouble straightened out. Now I got more trouble. I got his contract. He is my fighter. I spoke to Glickman about it so don’t worry.’ ” [43 R.T. 6525.]

This remark by Carbo was made two days before Akins fought Logart in an elimination bout leading up to the selection of a new welterweight champion to assume the vacant title. [13 R.T. 1937.] It is also interesting to note that when Akins defeated Logart in that fight, he then faced another Carbo-controlled fighter in the final elimination bout for the title: Vince Martinez, who was managed by co-conspirator Daly. [13 R.T. 1937; 21 R.T. 3064.] Thus, the relevance of the conversations in Goldie Ahern’s Restaurant was much too clear for Carbo’s comfort.

The last item listed in footnote nine by Carbo is the evidence showing that Leonard was in Tijuana, Mexico in the company of an officer of the Los Angeles Police Department on May 11, 1959. [43 R.T. 6448-6457.] The reason for offering this evidence in rebuttal was to negate a suggestion made by Daly, during his testimony for Gibson, to the effect that Leonard was wasting his time playing in Tijuana when he should have been working to save the Club. [23 R.T. 3332-3336.] The rebuttal testimony established that Leonard was in Tijuana that day on business.

8. The Declarations of Co-Conspirator Daly Were in Furtherance of the Objects of the Conspiracy and Were Properly Received by the District Court.

Appellants found Daly to be a useful agent of their criminal conspiracy until the indictment was returned. Now they disavow his loyal services in their behalf and urge that evidence of the pressure and intimidation which he exerted upon the victims was not admissible against them. [Carbo's Op. Br. 5-17, 58-62.]

(a) *Prior Consistent Statements.*

Carbo's first contention is that the tape recordings [Exs. 100-102, 176] of Leonard's meeting with Daly on May 14, 1959, at the Ambassador Hotel are inadmissible, because they contain prior consistent statements by Leonard. This claim is frivolous. They were received for Daly's remarks thereon, not for Leonard's. Daly was not a prosecution witness. It is the highly probative effect of Daly's statements in these recordings to which Carbo objects, not Leonard's, since Leonard did not have a co-conspirator's knowledge of the contemporary activities of Carbo, Gibson, and Palermo in the East.

However, the recordings of the May 14th conversation were admissible to corroborate Leonard's testimony of the recorded conversation, even if they were evidence of prior consistent statements by him. [6 R.T. 751-754.] They were offered after the cross-examination of Leonard, during which appellants attempted to suggest recent fabrication by the witness.

Di Carlo v. United States, 6 F. 2d 364, 366 (2 Cir. 1925), *cert. den.* 268 U. S. 706 (1925).

(b) *Daly Was Shown to Be a Co-conspirator, as Alleged in the Indictment, and a Talking Agent of the Appellants.*

On two successive days in May 1959, Daly, who is named as an unindicted co-conspirator in the indictment, had extended conversations with Jack Leonard. On May 13, 1959, Daly went to the Hollywood Legion Stadium where he insisted on talking to Leonard, not in Leonard's office, but in the empty auditorium. [6 R.T. 751-752.] In this conversation, Daly warned Leonard that he was "in a hell of a jam". Daly said that he did not know what he could do for Leonard:

"... He said, 'You have got the whole East upset.' He said, 'Everybody is blaming everybody else. Norris is upset, Gibson is upset, and Carbo is upset and Palermo is upset.' He said, 'you have just got the whole dam [sic] works upset.'" [6 R.T. 752.]

Then Daly discussed Leonard's and Nesseth's difficulties with Carbo and Palermo, concluding:

"... '[N]ow you are in a hell of a mess.' And he said, 'I just don't know how I can straighten this thing out.' He said, 'I doubt if I can.' He said, 'Carbo is really boiling.' He said, 'When I left back there I talked to him a couple of nights before,' and he said, 'he is real upset about this situation out on the Coast.'" [6 R.T. 753-754.]

Daly's parting remarks demonstrate his role as the joint representative of Carbo and Gibson, because his statement relates the two forces of the extortion con-

spiracy: Carbo and the I.B.C. Daly asked Leonard to try to get Nesseth to agree to talk with him (Daly):

“He said, ‘I would like to straighten the thing out.’ He said if he could straighten Nesseth out, that maybe he then could go back to Carbo or Norris and get the money to put the Club back on its feet. And with that he said, ‘See me in the morning. . . .’” [6 R.T. 754.]

Appellants did not object to this entire conversation wherein Daly admitted his conspiratorial role as a diplomat for extortionists. The conversation indicated that Leonard was to see Daly the following day. Appellants seek to suppress evidence of the events which transpired the following day in Daly’s room at the Ambassador Hotel. They contend that Daly was not shown to be a conspirator so that his declarations during the period of the conspiracy, which were calculated to further the objects of the conspiracy, could be received against all appellants.

We submit that abundant evidence of Daly’s status as a co-conspirator appears in the record justifying consideration by the jury against the appellants of the May 14 session.

Once Leonard had been induced by Gibson and Palermo to accept their demand to give up “half of the fighter” on October 23, 1958, Carbo and Palermo realized that Leonard had to be brought under tighter supervision and control by a face-to-face indoctrination session. This was the purpose of the Miami meeting on January 6, 1959. The problem facing the Carbo group was to lure Leonard there without arousing his fears. Palermo’s job was to convince Leonard

that he could meet with James D. Norris in Florida and obtain Norris' support in his efforts to book more nationally televised bouts of leading fighters for the Hollywood Legion Stadium. [5 R.T. 622-623.] Leonard was short of funds during this period of time, a fact which he communicated to Daly, during a call from Daly about December 15 or 16, 1958. Daly's sudden interest in Leonard is not surprising, since Jordan had just won the welterweight title ten days earlier. He told Leonard that "he would get hold of some people and see what he could do" about Leonard's financial difficulties. [5 R.T. 623-624.] Palermo continued his calls urging Leonard to come to Miami to see Norris. [5 R.T. 624.]

On December 23, 1958, Palermo called again and told Leonard that he had spoken with Daly and the money was being sent to Leonard. That same afternoon, Leonard was notified by Western Union that a \$1,000 money order had been sent to him by Daly. [5 R.T. 624; Ex. 59.] The next day Palermo called once again, insisting that Leonard come to Miami; Palermo said that everybody was going to be in Miami and that he wanted Leonard to be there as well:

" . . . He said I could tell Norris just what Mr. Gibson was doing and what Mr. Parnassus was doing out here, and that I could get all the help I wanted as long as I could assure the right people back there I could control the welterweight champion." [5 R.T. 624.]

During the following week, Palermo's demands for Leonard to go to Miami became more persistent. Leonard continued to avoid the issue, telling him he could

not get an airline reservation during the holiday season. Palermo called Leonard back and told him that TWA had space available on January 4 and 5, 1959. Leonard still tried to parry Palermo with the reply that he did not have much money. Palermo replied:

“. . . ‘Don’t tell me that.’ He said, ‘You have got a thousand dollars.’

“I said, ‘How do you know about the thousand dollars?’

“He said, ‘Well, I sent it.’ ” [5 R.T. 625.]

Palermo appears to have been telling the truth about this. The application for the \$1,000 money order was filed with Western Union in Philadelphia, where Palermo lived, not in Englewood, New Jersey, where Daly resided. Although the application was intended to attribute the transmittal of funds to Daly, Palermo misspelled Daly’s name on the application: D-a-l-e-y. [Cf. Ex. 82 with 6 R.T. 748-749 and 24 R.T. 3441-3442.] Thus, Daly and Palermo cooperatively endeavored to lure Leonard to the Miami meeting where Carbo, not Norris, could confront Leonard and convince him of the futility of attempting to challenge his control of the championships. [5 R.T. 639-646.]

When Jordan had successfully defended his title in April, 1959, and Nesseth and Leonard had failed to pay Palermo and Carbo any portion of that purse, the terror tactics commenced in earnest. Carbo’s and Palermo’s telephone threats were followed by Palermo’s trip to Los Angeles and his visits to Leonard with his local reinforcements, Sica and Dragna. This direct pressure did not obtain the objective: Leonard’s and Nesseth’s surrender to Carbo. However, Leonard’s and

Nesseth's telephone call to Gibson on May 3, 1959, requesting him to get Palermo out of Los Angeles, coupled with Palermo's difficulties with the Los Angeles Police Department as he was leaving Los Angeles, on the night of May 6, 1959, necessitated employment of another of Carbo's regular emissaries in an attempt to finish the job on Leonard and Nesseth. This was Daly's task.

After Leonard's and Nesseth's demand to Gibson on May 3 that he "call off the dogs", Gibson telephoned Palermo at the Beverly Hilton Hotel on the following night, using Palermo's alias, *George Tobias*. [13 R.T. 1830; Exs. 34, 84-A, 85-A.] Either that day or the following day, Gibson called Daly and arranged for Daly and himself to fly to Los Angeles. [32 R.T. 4662; 23 R.T. 3404.]

About eight hours before meeting Gibson at New York International Airport on May 11, Daly telephoned Carbo and Palermo at the Cori house in Philadelphia, at 1:42 A.M., May 11, 1959. [Exs. 156-160, 166; 43 R.T. 6323-6330; Exs. 100-102, 176, 101-A for Ident. at pp. 24, 46-47.] Apparently, Daly was obtaining his last minute orders from one of his two masters.

Daly's expenses for his stay at the Ambassador Hotel in Los Angeles from May 11 until May 22, 1959, were paid by Gibson's company. [Exs. 91-A, 91-B, 91-C; 22 R.T. 3150-3151.] When Gibson learned that Leonard was not in Los Angeles, he left Daly there to deal with Leonard on Leonard's return, and flew back to Chicago the same day. [32 R.T. 4664, 4669; Exs. 90-A, 90-B.]

During that week, when Daly was not with Leonard, he found time to meet with appellant Sica. [22 R.T. 3140.] Also present at this meeting were two other persons who had had questionable dealings in the past with Carbo: George Parnassus and Edward Underwood. [5 R.T. 641-642; 26 R.T. 3723-3724, line 11; 3727, line 19-3728; 3733, lines 10-12.]

In addition to the foregoing evidence of Daly's conspiratorial role, two factors of the most persuasive quality should be considered in evaluating the proof that Daly was a co-conspirator. The contents of Daly's remarks on May 13 and May 14 provide circumstantial evidence of his complicity with appellants, since he reveals knowledge of the activities of the conspirators in these two conversations, activities with respect to Leonard, which could not have been known to him unless one or more of the conspirators had taken him into their confidence during the course of the conspiracy. Circumstantial evidence, aside from Daly's statements, reveals that the conspirators who had taken him into their confidence prior to May 13 were Carbo, Palermo, and Gibson.

Thus, if Daly were not a member of the conspiracy charged, how did he become so conversant with the facts of the relationship among Gibson, Palermo, and Carbo, in connection with the demand for control of Jordan? [See Exs. 100-102, 176, 101-A for Ident. at pp. 10, 21, 24, 30, 44-45.] Daly testified that he had not spoken with Palermo or Carbo on the telephone for one and one-half years prior to May 13, 1959. [21 R.T. 3099-3102.] If that were true, he failed to explain why he told Leonard on May 14, 1959, that

Palermo called him at home and asked him to contact Jerry Geisler to help him (Palermo) with his petty larceny case in Los Angeles. [Exs. 100-102, 176, 101-A for Ident. at pp. 46-47.] Palermo had been arrested on that charge only one week earlier as he was leaving Los Angeles by plane for the East. [41 R.T. 6120-6122, 6126, 6118.]

The second convincing fact that establishes Daly's status as a co-conspirator, aside from all that has been set forth above, is Gibson's use of Daly at the trial. Gibson called him as a defense witness after the prosecution's evidence of Daly's activities of May 13 and May 14, 1959, had been admitted into evidence. Gibson chose to question Daly about certain aspects of the tape-recorded session of May 14, but studiously avoided mention of all the portions thereof which incriminated himself or any of the other appellants. Having Daly available as a witness, indeed having used him on a direct examination which consumed 74 pages of the Reporter's Transcript [21 R.T. 3061-3114; 22 R.T. 3121-3141], Gibson elected not to have Daly deny having made the statements which incriminated all the appellants, nor to have Daly explain his remarks in a manner which would eliminate their probative significance as evidence of appellants' guilt. Failing to have Daly deny these incriminating declarations or explain them away, after having called him as a defense witness, Gibson must suffer the unfavorable inference that Daly's testimony on these matters would have been un-

favorable to him by tending to establish Gibson's membership in the conspiracy with Daly and the other appellants, a fact which Daly made clear to Leonard on May 13 and 14, 1959.

Samish v. United States, 223 F. 2d 358, 365 (9 Cir. 1955), *cert. den.* 350 U. S. 848, *reh. den.* 350 U. S. 897 (1955);

United States v. Fox, 97 F. 2d 913, 915 (2 Cir. 1938);

Cf. Caminetti v. United States, 242 U. S. 470, 492-495 (1917).

Furthermore, if Daly were not a member of the conspiracy charged in the indictment, why did he repeatedly perjure himself, both on direct and cross-examination, in an effort to establish that Leonard had omitted certain portions of the conversation when he made the Minifon wire recording? [Exs. 100-102, 101-A for Ident.] There is no doubt whatsoever that Daly did perjure himself. He listed ten topics of conversation which he had had with Leonard on the morning of May 14 in his hotel room, none of which is to be found on those recordings. [22 R.T. 3125-3135; 23 R.T. 3285-3300; Exs. 100-102, 101-A for Ident.] Daly, and presumably the five appellants, did not realize that two independent recordings had been made of the May 14 conversation. Nor did they realize that Sergeant Keeler of the Los Angeles Police Department was listening to the conversation as he recorded Exhibit 176 through a radio receiver tuned to

a radio transmitter concealed upon Leonard's person. Exhibit 176 and Sgt. Keeler's testimony established Daly's perjury to a mathematical certainty. [44 R.T. 6697-6703.] Daly perjured himself at other places in his testimony, if we assume that his prior inconsistent sworn testimony before the Grand Jury in September, 1959, was truthful. [22 R.T. 3260-3279.]

Appellants do not question the fact that Daly was an agent of at least one of their number. [32 R.T. 4662-4670; 21 R.T. 3092-3097.] Gibson used Daly as an emissary in Los Angeles not only in May, 1959, but at the time he was secretly taking over the Legion Stadium in the fall of 1958, using Leonard as a figure-head to satisfy the California State Athletic Commission. [29 R.T. 4322; 23 R.T. 3307-3308; 27 R.T. 3974.] Daly was to have a secret 20 per cent interest in the Hollywood Boxing and Wrestling Club under Gibson's plan. [28 R.T. 4181-4183; 21 R.T. 3083-3084; 28 R.T. 4139-4140; 29 R.T. 4327-4328; 25 R.T. 3694-3695; 21 R.T. 3080-3082; 28 R.T. 4181-4183; 29 R.T. 4321-4322.]

Once Daly's agency was established, his declarations in furtherance of the criminal conspiracy were admissible. The criminal purpose of the declarations can be established by the declarations themselves:

“ . . . In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and

defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves.”

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 249 (1917).

Accord:

Fuentes v. United States, 283 F. 2d 537, 539-540 (9 Cir. 1960).

(c) *Daly's Declarations Were in Furtherance of the Conspiracy.*

The element of criminality is clearly established in Daly's declarations to Leonard on May 13 and May 14. Carbo contends that declarations of a co-conspirator must be in furtherance of the conspiracy in order to be admissible against the co-conspirators and that Daly's were not. We submit that Carbo is in error in both contentions. First, the declarations need not be in furtherance of the conspiracy so long as they are made by a co-conspirator during the period of the conspiracy. Second, these declarations were unquestionably intended to execute the conspiracy. The Supreme Court held sixty-six years ago:

“ . . . The declarations must be made in furtherance of the common object, or must constitute a part of the *res gestae* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the Horsa had been proven, then, on the question whether such combination was lawful or not, the motive

and intention, *declarations of those engaged in it explanatory of acts done in furtherance of its object came within the general rule and were competent. . . .* [Emphasis supplied.]

Wiborg v. United States, 163 U. S. 632, 657-658 (1896).

The facts set forth in the Supreme Court's opinion in *Wiborg* indicate that the declarations were not made in furtherance of the conspiracy; however, what was said by the persons aboard the *Horsa* explained the purpose of its voyage, which was the fact in issue. A district court opinion in the *Cellophane Case* follows *Wiborg* and squarely holds that the declarations of a co-conspirator need not have been made for the purpose of furthering the objects of the conspiracy in order to be admissible against the other co-conspirators:

“. . . I think it sufficient for purposes of admissibility if the subject matter of the co-conspirator's admission relates to the purpose of the conspiracy or is explanatory of acts done in furtherance of the objects of the conspiracy. . . . Thus, a statement by a co-conspirator to a third party concerning some act done in furtherance of the conspiracy is admissible although the actual making of the statement in no way furthered the conspiracy. . . .”

United States v. E. I. du Pont De Nemours & Co., 107 F. Supp. 324, 325 (D. Del. 1952), affirmed on the merits 351 U. S. 377 (1956).

The three cases cited by Carbo for the proposition that the declarations must be made in furtherance of the conspiracy are not authority for the issue pre-

sented herein. In each case cited, the statement was *obiter dictum* since the facts presented declarations made *after the termination of the conspiracy*.

Delli Paoli v. United States, 352 U. S. 232, 237 (1957);

Fiswick v. United States, 329 U. S. 211, 217 (1946);

Logan v. United States, 144 U. S. 263, 308-309 (1892).

In any event, the contents of Daly's statements to Leonard are a series of subtle extortion threats. As a "front man" for Carbo and Gibson, Daly used the modern *soft sell* technique. His testimony during the trial, and his statements to Leonard in the recordings, indicate that Daly played the role of *everybody's friend* in the boxing business, a duplicitous role which the conspirators would utilize when other measures proved inappropriate or ineffective. The thrust of what Daly said to Leonard in his casual manner on May 14 is a very pointed reminder to Leonard of what he should have learned during his years in boxing: that Carbo and Gibson controlled all money-making facets of professional boxing and that force had been used by the conspirators in the past to overcome obstacles *e.g.*, Leonard and Nesseth, and would be used, if necessary, in this case. Many portions of the May 14 conversation which support this analysis are summarized or set forth at length in the Statement of Facts, above. Daly's description of how Ray Arcel was beaten nearly to death when Arcel tried to leave the Carbo fold is a ghoulish illustration of Daly's technique of intimidation. While commiserating with Leonard about his

perilous position, Daly described Leonard's danger in a fine Italian hand:

"See what they do. They use a water pipe, see. You know, regular lead water pipe. Lead pipe. And about that short. About that thick. And they just get an ordinary piece of newspaper, see, newspaper don't show fingerprints. Then they take it and they wrap it just in the newspaper, see —" etc. [Exs. 100-102, 176, 101-A for Ident. at pp. 32-34.]

Daly expressed the opinion to Leonard that Arcel "just got stupid," he had no right to stop paying off to Carbo after all those years. [*Id.* at p. 33.] The parallel to Leonard's situation, the message which Daly intended to convey to Leonard, is obvious. Threats may be communicated as well by parable as with a gun. The total impact of this two and one-half hour session is that Daly, as Carbo's and Gibson's representative, was informing Leonard that if Daly could not assure Carbo of Nesseth's immediate capitulation to Carbo's demands for control of Jordan, Leonard and Nesseth would suffer Ray Arcel's fate, or worse. [See Exs. 100-102, 176, 101-A for Ident. at pp. 13, 14-16, 18-23, 30, 32-35, 44, 49-50, 52-53, 56-57.]

The May 14, 1959, threats, to which appellants have objected, as well as the May 13 threats of Daly, to which appellants failed to object, were as competent against the five appellants as the Carbo and Palermo telephone threats of April 28, 1959. Both episodes played the same role in the execution of the conspiracy, the further terrorization of the victims, Leonard and

Nesseth. Both were overt acts of the conspiracy charged in Count One. [I C.T. 4-5.] The May 14 conversation was properly received.

9. Impeachment of Sica on His Misdemeanor Conviction.

Sica took the witness stand in his own defense. At the conclusion of his direct examination, Sica's counsel attempted to minimize Sica's felony conviction record by purporting to cover it in four brief questions before cross-examination could begin. [36 R.T. 5357.] Sica lied in his response, admitting only two of his felony convictions.

On cross-examination, the prosecutor's first questions were aimed at exposing Sica's concealment of his true record of convictions. At first, Sica denied his third felony conviction which he suffered in the State of New Jersey for the crime of robbery. [36 R.T. 5359.] However, after he and his counsel were shown copies of his two felony convictions from New Jersey [36 R.T. 5360-5361; Ex. 134 for Ident., Ex. 136 for Ident.], he reluctantly admitted his third felony conviction. [36 R.T. 5362-5363; 37 R.T. 5516.]

Having concealed one felony conviction and admitted two others, Sica was then asked by the prosecutor:

"And in 1951 were you convicted of a conspiracy to violate certain sections of the Penal Code of the State of California? . . . Specifically, subsections 1, 2, 3, 4, 5, and 6 of Section 337(a) of the Penal Code." [36 R.T. 5363-5364.]

Counsel for Sica objected to the question and suggested another bench conference, during which he represented to the Court that this fourth conviction of

Sica for conspiracy, although a felony, resulted in a misdemeanor type sentence rendering it, under California law, a misdemeanor conviction. In reply to the representation, the prosecutor read from an exemplified copy of that judgment [Ex. 135 for Ident.], as follows:

“Conspiracy to violate subdivisions 1, 2, 3, 4, 5, 6 of Section 337(a), Penal Code, *a felony*, as charged in the Information, and defendant having admitted prior convictions as alleged in the Information.” [36 R.T. 5364-5365. Emphasis supplied.]

The court then read the copy of the judgment and tentatively concluded that it constituted a misdemeanor conviction, although denominated a felony on its face, because the sentence was one year. [36 R.T. 5365.] The prosecutor replied that the exemplified copy of the judgment stated on its face that the conviction was for “a felony” and urged further that the conviction was a proper basis for impeachment, even if California law made it a misdemeanor conviction, because the conviction was for *conspiracy* which is a crime involving moral turpitude. [36 R.T. 5366-5367.] At this point Sica’s counsel moved to strike the question and asked the court to instruct the jury to disregard it. Judge Tolin asked counsel if he would like the jury to be instructed as to the nature of Section 337 of the California Penal Code, indicating what it is and that it had misdemeanor status. At this point, the jury had not heard if Sica had been convicted of this offense or what it was. Sica’s counsel expressly requested such an instruction. [36 R.T. 5367.] Before

the instruction was given, Sica's counsel volunteered that he believed the prosecutor had asked the question in good faith. [36 R.T. 5367-5368.] The court agreed with this suggestion, pointing out:

“Counsel can readily be misled by the fact that the judgment on its face refers to the offense as being a felony. Courts are often misled, and I might say the law is in some state of confusion.” [36 R.T. 5368.]

Judge Tolin then turned away from the bench conference and instructed the jury at length on the law of witness impeachment, stressing that the conviction most recently asked about was for a misdemeanor and therefore could not be considered by them at all in evaluating the credibility of this witness. [36 R.T. 5368-5371.]

After the court had finished its admonition to the jury on this point, it requested Sica's counsel's opinion and he indicated to the court his satisfaction with the instruction. [36 R.T. 5372.]

That was the end of the matter until the following day when Sica's counsel reversed his field and accused Government counsel of asking about this conspiracy conviction in bad faith, knowing it to be a misdemeanor. For the first time he made a motion for mistrial on this ground. [36 R.T. 5408-5410.] Denying this motion, Judge Tolin found that the question was asked in good faith and pointed up the legal confusion connected with the problem of impeaching witnesses who have suffered convictions under California law. [36 R.T. 5410-5411.]

Once again in this Court, Sica's counsel alleges without foundation, and contrary to Judge Tolin's finding, that the prosecutor asked about this conviction when "he knew the conviction was a misdemeanor, not a felony." [Sica's Op. Br. 52-57.]

The fallacy of this specification of error by Sica is that he fails to establish his underlying legal assertions: (1) that the question was improper and if so, (2) that prejudicial error was committed in asking it. He has cited no federal authority in his Opening Brief supporting the proposition that a witness in a federal criminal case may be impeached only by proof of convictions for crimes defined as *felonies* in the convicting forum.

California statutes and decisions which are cited by Sica define the line between felony and misdemeanor convictions in California courts. However, in a federal criminal prosecution, federal common law determines which convictions may be used to impeach a witness's credibility.

Rule 26 F. R. Crim. P.

The federal rule is that a witness may be impeached by establishing that he has been convicted of a felony *or* convicted of a misdemeanor amounting to a *crimen falsi*.

United States v. Montgomery, 126 F. 2d 151, 154-155 (3 Cir. 1942), *cert. den.* 316 U. S. 681.

The *Montgomery* case indicates that a *crimen falsi* is an offense the conviction for which logically sheds doubt upon the credibility of the offender, now tes-

tifying as a witness. A conspiracy to violate the laws of a State, especially the laws prohibiting such organized criminal activity as bookmaking, would appear to be an offense which sheds considerable doubt upon the witness' credibility—certainly as much doubt as a conviction for the offense of depositing a revolver in the mail [18 U. S. C. §1715], a felony.

The Supreme Court has recently restated the socially dangerous and sinister characteristics of a criminal conspiracy which justifies independent punishment for its commission, separate and apart from the commission of the substantive offense. Mr. Justice Frankfurter, referring to a conspiracy to commit a racketeering offense, said for the Court:

“. . . For example, in *Clune v. United States*, 159 U. S. 590, the Court upheld a two-year sentence for conspiracy over the objection that the crime which was the object of the unlawful agreement could only be punished by a \$100 fine. . . .

“This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a

conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.”

Callanan v. United States, 364 U. S. 587, 593-594 (1961).

We submit that the question about Sica’s criminal conviction was a proper impeaching question. In any event, the question was asked in good faith after Sica had concealed his true felony conviction record. No prejudice resulted on any reasonable view of the matter since the court cautioned the jury to disregard the question entirely, and none of Sica’s felony convictions were alluded to by the prosecutor during his argument to the jury, although Sica’s counsel repeated the incorrect statement that Sica had suffered only *two* felony convictions, in his argument to the jury. [48 R.T. 7206.]

Rule 52(a), F. R. Crim. P.;

Kotteakos v. United States, 328 U. S. 750, 764-765 (1946);

Cf. Carlton v. United States, 198 F. 2d 795, 799 (9 Cir. 1952), (prosecutor’s good faith belief);

Bohol v. United States, 227 F. 2d 330 (9 Cir. 1956), (no conviction at all).

Certainly, the jury was not prejudiced in this case by the asking of this question after it had learned that Sica's criminal record included three prior felony convictions, among them a conviction for a crime of violence. [36 R.T. 5363; Ex. 134 for Ident. (robbery).]

10. Proof of Bias and Corruption of Sica's Witness, Tom Stanley, Was Properly Admitted.

Understandably chagrined about his own decision to call Tom Stanley (true name: Salvatore Casarona) as a witness to discredit Jack Leonard, Sica urges this Court to find that it was error to allow the prosecution to show Stanley's criminal complicity with and bias for Sica. [Sica's Op. Br. 40-41, 72-85.] Stanley was for many years a boxing manager and promoter who frequented the Hollywood Legion Stadium during Leonard's tenure. After the Club went into bankruptcy, Stanley periodically visited Leonard at the Gossett-Ames Ford agency where Leonard worked, in order to collect installments on a debt which Leonard owed to him. [20 R.T. 2852, 2854, 2863-2864.]

The gist of Stanley's direct testimony for Sica was an attempt to show that Leonard had asked Stanley to contact Sica, with whom Stanley was acquainted, in order to hasten the payment from appellants to Leonard of \$20,000 so that Leonard could leave the country. [20 R.T. 2864-2865.] The second barb to Stanley's dart was the story that Leonard had telephoned him a few days before the trial began in order to suggest that Stanley avoid service of a subpoena in this case. [20 R.T. 2066-2067.]

Cross-examination began a revelation of quite a different picture of Stanley's activities from the minute Sica walked out of Leonard's office on May 6, 1959, until the trial began. Stanley's cross-examination should be read in its entirety to fully appreciate the Judas role he played for Sica. [20 R.T. 2868-2938, 2943-2949, 2952-2958, 2963-2966.] Stanley repeatedly contradicted himself about the extent and nature of his relationship with Sica. He admitted a casual acquaintance with him for five years, at first, but denied ever having telephoned Sica. [20 R.T. 2868-2869.] Later, he slipped, admitting he had spoken with Sica four or five times on the telephone. [20 R.T. 2910.] He explained that he obtained Sica's telephone number from the telephone directory. [20 R.T. 2913.] Later, apparently realizing that he had fallen into a self-made trap (Sica's telephone number was not published in the telephone directory [Exs. 161, 163]), he changed his story and said that he had learned Sica's number from Norman Sugarman. Mr. Sugarman happened to be the attorney for both Sica and Stanley. [20 R.T. 2866, 2948-2949.]

Stanley denied having made statements to California State Athletic Commission investigators in the Spring of 1960 which were diametrically opposed to his direct testimony. [20 R.T. 2869-2899.] However, on rebuttal, Ray Bascom, a special investigator for the Commission, testified that he had called Stanley to the Commission's Los Angeles office on May 1, 1960, to question him about two telephone calls made to him by Sica. Stanley explained to Bascom in 1960 that Leonard had told him he was afraid

Sica might hurt him “and told him that he knew Stanley was a friend of Sica and he wanted Stanley to contact Sica and take the pressure off.” Bascom took Stanley to the office of the United States Attorney where Stanley repeated these facts which were in complete contradiction to Stanley’s testimony one year later in court. [44 R.T. 6669-6670. Emphasis supplied.]

As the trial neared, Stanley tried to lay a foundation for changing his testimony by contacting Bascom and telling him he had lied the previous year about the calls from Sica; that the real explanation was that Leonard had asked him to obtain \$15,000 from Sica or Palermo in exchange for Leonard’s departure from the United States. [44 R.T. 6670-6671.] Apparently Stanley had not learned his script thoroughly when he reported the *true story* to Bascom in 1961, since his testimony on direct examination raised the price to \$20,000. [20 R.T. 2864.] In the hall outside the courtroom, Stanley made a second *amendment* to his story so that Bascom would not be too surprised by Stanley’s testimony on the witness stand. [44 R.T. 6672.]

The impeachment of Stanley was completed by Leonard’s testimony on rebuttal in which he exposed Stanley’s repeated attempts to corrupt him, first by urging him to exculpate all of the appellants, later by acting as a go-between for Sica and the other appellants in connection with a proposition to pay Leonard to leave

the country, and finally by suggesting that Sica would pay Leonard to testify in order to exculpate Sica, but not the other appellants. [43 R.T. 6349, 6356-6363, 6367, 6371, 6373, 6376-6381, 6386, 6388, 6390-6396, 6398; Ex. 122-A.]¹³

Stanley's self-contradictions on cross-examination, and Bascom's and Leonard's independent impeachment of him conclusively established to the jury, whose finding of fact on credibility is conclusive, that Stanley's direct testimony was a fabrication and that he was guilty of bias and attempted corruption. The Supreme Court of Oregon has held:

"Moreover, we think it was further competent, as tending to disclose . . . McClain's corrupt intentions, and hence his untrustworthiness, in relation to the very case on trial . . . McClain, having pleaded guilty prior to the time when the impeaching evidence was offered, may be regarded, for the purposes of the discussion, as a witness rather than as a party. His letter contained threats calculated to intimidate Mann into swearing falsely before the grand jury in respect of material facts in the case. We are of the opinion that, by the weight of authority, the letter was

¹³These citations of Leonard's extensive testimony on rebuttal suggest that Gibson was in error when he said in his Opening Brief, "In fact, the prosecution itself had so little confidence in Leonard's capacity for truth that he was not submitted as a rebuttal witness though practically every part of his testimony was contradicted over and over again by prosecution witnesses, defense witnesses, and defendants." [Gibson's Op. Br. 37.]

admissible in proof of the witness's corrupt intentions relative to 'the case in hand'"

State v. Moore, 180 Ore. 502, 176 P. 2d 631, 633 (1947).

See also:

People v. Alcalde, 24 Cal. 2d 177, 184, 148 P. 2d 627, 630 (1944);

3 Wigmore on Evidence (3rd Ed. 1940) at pp. 498-499, 516-517 (§§948, 949, 960).

This Court has also followed this rule of impeachment for bias:

" . . . The propriety of showing the bias of a witness not only by cross-examination but by extrinsic testimony of other witnesses is well settled. . . ."

Greatbreaks v. United States, 211 F. 2d 674, 676 (9 Cir. 1954);

Cf. Ewing v. United States, 135 F. 2d 635, 640-642 (D. C. Cir. 1943), *cert. den.* 318 U. S. 776 (1943).

Stanley falsely denied having told a completely different story to Bascom at the California State Athletic Commission when he was called in for questioning in the Spring of 1960 about calls to him from Sica. Bascom established the prior inconsistent statement. Stanley falsely denied repeated attempts to intimidate Leonard with the not too subtle threat of the presence of a convicted murderer and countless reminders during the months before and after the indictment, while the case was awaiting trial, that Leonard was being

foolish to risk his family and his own life to the peril of the conspirators, for Nesseth and McCoy.

His role as a criminal emissary of Sica, as an advocate for corruption, was not suppressible under any rule of evidence applicable in the federal courts. To merely state such a proposition is to refute it:

“The witness’ attempt to bribe another witness to speak falsely to [sic] or abscond indicates for the case in hand a corrupt intention on the first witness’ part, and thus affects his trustworthiness. . . .”

3 Wigmore on Evidence, *supra*, at p. 516 (§960).

This extrinsic impeaching evidence was carefully limited by Judge Tolin’s instruction to the jury at the time the evidence was received. He cautioned the jury that the evidence of conversations and acts between Stanley and Leonard was offered not for the truth of what Stanley conveyed to Leonard, but as evidence of the fact that Stanley had tried to convey certain impressions to Leonard. [44 R.T. 6690-6692.]

Sica must suffer the consequences of vouching for a corrupt accomplice as a truthful witness. The rules of evidence are not designed to conceal such essential evidence on credibility from the court and jury.

11. Denial of Bail During Trial.

Appellants Palermo, Carbo, Sica, and Dragna claim that they have been denied due process of law and equal protection of the law because their bail was terminated at the outset of the trial. [See Palermo’s Supp. Op. Br. 13.]

All appellants, with the exception of Carbo, were at liberty on bail from the time of the indictment, September 22, 1959, until the trial commenced on February 21, 1961. Carbo was in the custody of the State of New York serving a two-year penitentiary sentence. His sentence was completed on the first day of the trial.

All appellants were remanded to custody that day. Gibson was admitted to bail again the same day. On appeal, this Court held that the record in the district court must reflect a reasonable foundation upon which to deny bail during trial.

Carbo v. United States, 288 F. 2d 282 (9 Cir. March 3, 1961).

A proceeding followed in the district court in which appellee made an extensive evidentiary showing with respect to appellants and the trial judge again denied bail. On appeal this Court ruled:

“We conclude that ample foundation was shown for the ground relied upon by the court, namely, that revocation of bail was necessary to remove a substantial threat to the safety of one or more Government witnesses. We hold that the trial court did not abuse its discretion in denying on this ground the motions to reset bail.

“It is accordingly unnecessary to decide whether a sufficient foundation was established for the other ground relied upon by the court—the likelihood that one or more of the appellants might abscond.”

Carbo v. United States, 288 F. 2d 686, 690 (9 Cir. March 15, 1961), *cert. den.* 365 U. S. 861 (March 27, 1961).

This Court has set forth the test for denying bail during trial:

“When a criminal trial is in actual progress there must be an accommodation between the right of a defendant to be free on bail and the inherent power of the court to provide for the orderly progress of the trial. . . .

“If, however, there is reason to believe that a trial actually in progress may be disrupted or impeded by the flight of the defendant, or by his activities in or out of the courtroom during the trial, the fair administration of justice is itself jeopardized. In that event the court may give precedence to its inherent power and revoke bail if necessary for the duration of the trial.”

Carbo v. United States, supra, at p. 285.

This Court cited *United States v. Rice*, 192 Fed. 720 (C. C. S. D. N. Y. 1911), and directed attention to *Fernandez v. United States*, 81 S. Ct. 642 (1961), in which Mr. Justice Harlan, sitting as Circuit Justice for the Second Circuit, affirmed the action of the Second Circuit, which had affirmed the trial court's exoneration of bail for a number of defendants, *sub. nom. United States v. Bentvena*, 288 F. 2d 442 (2 Cir. Feb. 7, 1961).

In arriving at these conclusions, both Mr. Justice Harlan in *Fernandez*, and this Court in *Carbo* have taken into account the decision of the United States Supreme Court in *Stack v. Boyle*, 342 U. S. 1 (1951), and have concluded that:

“. . . District Courts have authority, as an incident of their inherent powers to manage the con-

duct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice. . . .”

Fernandez v. United States, supra, at p. 644.

Since the record contains voluminous documentation supporting the trial judge's action in exonerating bail, we will not attempt to restate its contents in this brief. [See *e.g.*, III C.T. 533-574 and 7 R.T. 968-973.] Moreover, this Court in its second bail decision in this case [288 F. 2d 686], has included some of the persuasive evidence upon which the trial judge predicated his decision. Suffice it to say, that Carbo, Palermo, Sica and Dragna had criminal backgrounds, and Carbo and Palermo came from districts outside of the Southern District of California. While Palermo claimed Philadelphia as his home, Carbo was not known to have any particular place of residence, and both travelled continually about the country. Sica was a three-time convicted felon, with a long record of violence in the Los Angeles area. Carbo had been convicted of manslaughter several years after his indictment for murder in the first degree. During the period between that indictment and conviction, Carbo was a fugitive from the State of New York for several years. Carbo was arrested on three other occasions for murder, and was reputed to be a member of Murder, Incorporated. He had been tried in Los Angeles for murder in the first degree, the trial ending in a mistrial because of disagreement among the jurors. Carbo was not retried because of the death of one witness and the refusal of the New York District Attorney to produce a sec-

ond witness for the California authorities. Palermo had been convicted of a misdemeanor in Philadelphia, and subsequently was charged with assault with intent to kill and reckless use of firearms.

The record in the trial showed that he was a close associate of Carbo and was connected with Carbo in the transmission of death threats to Leonard and Nesseth. During the period of the conspiracy, Palermo had travelled about the country and had obtained underworld assistance in an effort to coerce Nesseth into releasing part of his interest in Don Jordan. Palermo was connected with the death threats of January 27, 1958 and April 28, 1959, and was with Sica at the time threats were made in the Beverly Hilton Hotel on May 2 or 3, 1959. Dragna, like Sica, had a notorious reputation in the Los Angeles area; and although he had never been convicted of a crime, his associations and conduct during the conspiracy were such as to clearly identify him as a person willing to employ violence in order to control the conduct of the prosecution witnesses.

In addition to the backgrounds of the appellants, the trial court had before it a great deal of evidence including the affidavits of Leonard and his wife (*sub. nom.* Leonard Blakely and Jeanne Blakely) who deposed that for a period of twenty-one months, and continuing after the commencement of the trial, they had been the recipients of over two hundred threatening telephone calls at home and at work, and that among other things Leonard was told he would never live through the trial; that his children would get hurt and that, with reference to his wife, he was told, "This is your last chance. Have youse ever seen a broad's gut

splattered?' ”, and, “ ‘Have you ever seen a broad spread eagle? Well, if you testify you’ll see it. Remember this on the stand.’ ” [III C.T. 533-537.]

Although appellants argue that remand during trial somehow denied them access to counsel, they have been unable to demonstrate the truth of this assertion. To the contrary, defense counsel were given easy access to their clients. [II C.T. 488; 2 R.T. 177-178; 3 R.T. 386-387; 18 R.T. 2737.]

Moreover, during the long period between the indictment and the trial, all of the appellants, except Carbo, were enlarged on bail with ample opportunity to assist in the preparation of their defense. Carbo, of course, as noted above, was serving a penitentiary sentence in the State of New York.

Although appellants couch their argument in terms of denial of due process, they reassert the same contentions urged upon this Court in *Carbo v. United States*, *supra*, 288 F. 2d 282, and 288 F. 2d 686. Since appellants have not raised any facts appearing in the record subsequent to these decisions, appellee respectfully submits that this Court is bound by the law of the case; the matter is *res judicata*.

12. Conduct of the Prosecution and the Trial.

Appellant Gibson, through his counsel Ming, has, at every stage of this proceeding, challenged the good faith and ethics of appellee and its counsel. He does so again in his Opening Brief. [Gibson’s Op. Br. 45-48.] Appellee will deal succinctly with each point raised by appellant.

(a) *Alleged Promise That the Indictment Against Gibson Would be Dismissed.*

Gibson repeats his charge that prior to trial the Government, to his prejudice, promised to dismiss the indictment against him. Since extensive memoranda, supplemented by affidavits, have been filed and appear in the Clerk's Transcript [V C.T. 1208-1210, 1211-1214, 1300-1322], their contents will not be repeated in this brief. There is very little that can be said on the point that has not already been said in the cited documents. Appellee respectfully urges the Court to consider these pleadings and affidavits.

The Gibson argument on this point is founded upon false hopes and forged documents. In the light of what Mr. Gibson must know concerning the authenticity of the documents, appellee wonders if he is acting in complete good faith when he urges this Court to deal with the subject. Suffice it to say, Gibson was furnished with forged documents which purported to demonstrate the Government's intention to dismiss the charges against him. These documents (a telegram falsely signed with the name of an Assistant United States Attorney; a forged letter purportedly signed by William Hundley, then Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice; and a forged stipulation to dismiss the indictment against Gibson, purportedly signed by Laughlin Waters, then United States Attorney for the Southern District of California) were fabricated by a highly paid representative of Gibson and were exhibited by representatives of Gibson to an Assistant United States Attorney in an effort to ob-

tain a dismissal from the Department of Justice. Although the forger himself denied that Gibson or his attorneys were aware of the false character of these documents, there is no doubt that both Gibson and his attorneys now know that they were counterfeit. For this reason appellee questions the good faith of Gibson's contention and suggests in this Court as it did below that if misconduct has occurred, it is to be found with appellant and not with the Government. Appellee welcomes a judicial inquiry into the conduct of all counsel in this matter.

The statement appearing in Gibson's Opening Brief on page 47, with respect to Judge Boldt's finding "that defense counsel were guilty of no misconduct and decided that the matter was moot", is incorrect. (It is to be noted that Gibson offers no citation to support such a statement.) Judge Boldt ruled as follows:

"The Court: There is one other matter that I wish to dispose of, and I think it can be done quickly, before hearing anything that counsel may wish to present, and that has to do with the motion of the plaintiff to strike certain portions of the material submitted by the defendant Gibson on motions to dismiss.

"I will simply say this, that I now find and hold that there is no showing of misconduct of plaintiff's counsel in the particulars referred to in the motion to dismiss, nor even any evidence that I regard as substantial or credible tending to show it.

"In the last response of defendant Gibson it is stated that the defendant has not asked the court

to accept or rely on the documents in question, he does not do so now, and neither he nor his counsel can now vouch for their authenticity, nor have they ever been able to do so or have done so.

“In view of this position it seems to me that the issue is moot and I see no point in taking the time or thought to consider striking the material. It is not necessary and therefore I decline to rule on it.

“I will simply say that representations of misconduct of counsel in any important particular are very grave and serious matters which should not lightly be asserted and without substantial and credible and authenticated information to justify it.

“I think it is not necessary to suggest that there has been any violation in this particular in that respect, and therefore I will simply leave it at that.” [52 R.T. 8049-8050.]

(b) *Allegations of Distortion by the Prosecution During Closing Argument and Improper Rebuttal Argument.*

(1) Appellant Gibson in his Opening Brief at page 47 claims that the prosecution distorted the evidence during closing argument, although, says Gibson: “Reasonable limitations of space will not permit detailed analysis of the extent to which the prosecution on closing argument distorted the evidence in a fashion which inevitably misled the jury.”

Counsel for Gibson made a similar statement to the jury in his final argument, saying: “I am going to pass up an awful temptation. I have in my notes some hundred or one hundred ten items about which I should like to comment on Mr. Goldstein’s state-

ments in his argument. . . .” [48 R.T. 7401.] At no time during his final argument nor at any other time has Gibson’s counsel been able to demonstrate the truth of this assertion. Appellee respectfully submits that its argument with respect to Gibson was carefully phrased and fully supported by the evidence.

(2) The statement of appellant Gibson that during rebuttal argument appellee raised two matters not referred to *by the prosecution* in its opening argument is misleading. Obviously, rebuttal argument is intended to *answer the defense argument* and the prosecutor did not go beyond this in the course of his rebuttal. The record citation set forth by Gibson to support his contention [49 R.T. 7588-7589] is an effort to republish before this Court the scandalous charge made by Gibson’s counsel at the bench when he called the prosecutor “a liar”. [49 R.T. 7589.] Gibson’s counsel had contended that the prosecutor’s argument concerning exhibits Z-36 and Z-37 was improper rebuttal. The prosecutor pointed out to the district court that attorney Ming had discussed Z-36 and Z-37 at length during his summation. Ming denied this, at which point associate counsel for the prosecution reminded him that he had actually held up Z-36 and Z-37 to the jury while he was discussing them, whereupon Ming made his slanderous and intemperate accusation, referred to above, and nearly provoked a fist fight at the bench. Of course, the fact is that the record shows Ming’s reference during his argument to Z-36 and Z-37 at 49 R.T. 7457. Appellee respectfully submits that the purpose of Gibson’s reference to this incident in his brief is to create an impression with the Court that appellee’s counsel acted improperly. Here again, the impropriety, if any, is to be found elsewhere.

(c) *Knowing Use of False Testimony.*

Of all of the charges made by appellant Gibson, this is the most outrageous, for it suggests that counsel for the prosecution have suborned perjury. [See Gibson's Op. Br. 54.] Gibson asserts that the Government "offered evidence, particularly testimony of Jack Leonard, which the prosecution knew was false and misleading in material parts." This charge is irresponsible and without foundation in fact. Carbo, in his Opening Brief, at page 44, footnote 3, impliedly makes the same suggestion. In support of this contention, he refers to appellee's final argument at 47 R.T. 7055 where appellee stated to the jury with reference to Mrs. Leonard's trip to Philadelphia, that "There would seem to be no question that they had talked about this before she went and that they had decided that if Mrs. Leonard obtained a sum of money or promise of a sum of money that Leonard would attempt to leave the country. I don't think there is any doubt of that."

The Government at no time characterized Leonard's testimony as "false" in any respect and, as a matter of fact, it is the Government's position to this day that Leonard testified fully, truthfully, courageously, and to the best of his ability, and that he did not knowingly lie or distort in any aspect of his testimony. Furthermore, as Judge Boldt pointed out in his Memorandum Order denying motions for new trial:

"The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesseth or both. Their testimony, in all essential particulars was fully and convincingly corroborated." [VI C.T. 1448.]

(d) *The Question to Carbo's Counsel by the District Court During Summation.*

Appellant Carbo claims he was prejudiced when the Court interrupted his counsel's argument to the jury to inquire for the basis for his statement that Carbo "lived in Miami, Florida, and had made his home there for ten years." [Carbo's Op. Br. 79-80. See 48 R.T. 7293.] Perhaps recalling the testimony of several defense witnesses who testified that they knew Carbo for years but had no idea now where he lived, what his telephone number was, what business he was in, or whether or not he had an office, the trial judge inquired of Carbo's counsel:

"Mr. Beirne, what evidence is there in the record that he lives in Miami, Florida, and made his home there for ten years?" To which, counsel replied, "Mr. Palermo testified to that." [42 R.T. 7293.] The court then said: "You are drawing on the testimony of Palermo," and counsel said: "Yes, your Honor." This was the extent of the colloquy which Carbo claims prejudiced him. In view of the record in the case, the trial judge was quite charitable since, during cross-examination Palermo gave the following testimony:

"Q. Did you ever go up to Mr. Carbo's home?

A. What home are you talking about?

Q. Well, where was Mr. Carbo's home? A. I don't know.

Q. Well, did Mr. Carbo ever invite you to his home? A. Never invited me to his house. *I didn't even know he had a home. That's the truth, Judge.*" [39 R.T. 5855. Emphasis supplied.]

C. The Instructions.

1. The District Court Fully Complied With Rule 30.

Dragna and Gibson complain that the district court did not inform them of the specific contents of the jury instructions in advance of their final arguments. Therefore, they contend, the court did not comply with Rule 30, F. R. Crim. P. [Dragna's Op. Br. 26, 39-43; Gibson's Op. Br. 53.] The court made the following remarks before counsel commenced their arguments:

"... The rule requires I advise you as to my intended action on the requests for instructions.

"Now, while perhaps you submitted five or eight, the numbers submitted by all counsel in the case add up to a tremendous number, and the court has rejected them all in the language in which submitted. This is not to say the principles of law in them are rejected, but your particular handiwork and draftsmanship is rejected.

* * * * *

"I had thought since there were many particular instructions and the rule requires that you be informed as to what I am going to do with respect to the particular ones you requested, which I interpret to mean the very language which has been suggested, that I had intended to say to you that if you would pull out a few that you particularly wanted given, that maybe I would give them in your language and I would tell you tomorrow morning first thing if you gave me a memo on it today.

* * * * *

“But the additional matter you have filed alerts me to the subject matter. I will go into the subject matters suggested, but I am not going to accept any of the proposed instructions as to language, that is, as it now stands. You may submit others if you want, even during argument, but in a case of this kind the court has to tailor its charge to the needs of the case, and I think many of these general instructions, while applicable, are on the whole, when just taken as a complete body, somewhat confusing and they are prolix.

“. . . The reason I don't tell you what I am going to give is I haven't heard your arguments and I cannot intelligently tell what needs to be emphasized in the charge until I have heard the case shaped up by the arguments of counsel.

* * * * *

“I think the purpose of the rule is that if you submit instructions on a particular point you are entitled to know whether the judge is going to give it or not, because if he is not you might argue on the theory he intends to give it and then if he doesn't give it, you are kind of cut off.

* * * * *

“But I felt, just on reading the total body of instructions submitted, as I have said many times, they are prolix, so in the form in which tendered they are rejected, but the court will try, during the time that the jury argument is being made, to develop a charge which will conform to the law and will take into account the accusations and the defenses that are emphasized here in argument

and as to which the jury should be particularly informed.

“You see, Judge Yankwich has a method by which he writes the instructions in advance and hands them to counsel. I just can’t work that way. I find that if you try to do that, you get on the horns of a dilemma. Counsel begin, in some cases, embroidering upon the court’s instructions, and I am not going to put myself in a straitjacket.” [45 R.T. 6787-6790.]

The trial judge was unquestionably correct in his observations. The arguments of counsel consumed four days and about 800 pages of the Reporter’s Transcript. [46 R.T. 6820-49 R.T. 7616.] The court’s charge to the jury lasted nearly three hours and was carefully tailored to structure the law to the case as it was presented to the jury in the lengthy summations of counsel. [50 R.T. 7634-7732.]

As argued to the jury, this case did not turn upon any nice interpretations of the applicable law. The issue for the jury was whether appellants planned and executed a conspiracy to commit extortion. The prosecution contended that they did. Appellants contended that the prosecution’s evidence should not be believed. Appellants have not even attempted to show that their arguments to the jury were in any way prejudiced by the court’s rejection of their offered instructions on the ground of prolixity. While there were many factual issues to debate in summation, the legal issues presented by the instructions were neither novel nor difficult.

Construing Rule 30 earlier this year, this Court held:

“Since counsel for appellant was in no manner inhibited or restricted in his argument to the jury, we find no prejudice to appellant by the failure of the court to observe the provisions of Rule 30 . . . and appellant has suggested none.”

Watada v. United States, 301 F. 2d 869 (9 Cir. 1962).

2. **The Jury Was Properly Instructed Upon the Use of Declarations of a Co-Conspirator With Respect to Membership in the Conspiracy.**

Carbo, Palermo, and Dragna, assert that the jury was not properly instructed upon the use of evidence showing acts and declarations of co-conspirators. [Carbo's Op. Br. 22-33, 53-58; Palermo's Op. Br. 7-8, 16-18; Dragna's Op. Br. 20-26, 35-37.] The district court instructed the jury on the law of conspiracy at length, during the presentation of evidence and in its charge to the jury before they retired to deliberate. The court's instructions relevant to this contention of error are collected in Appendix F, below.

(a) *Declarations of a Co-Conspirator.*

Consideration of the instructions given by Judge Tolin reveals that he did instruct the jury that the declarant's membership in the conspiracy must be established by evidence apart from his declaration, before the declaration may be used against his co-conspirators. For example, during the reception of evidence, the trial judge cautioned the jury as follows:

“I will tell the jury that, of course, when any one of a group of conspirators makes a statement in furtherance of the purpose of the conspiracy, that is binding on all the conspirators. But that rule only applies if there are co-conspirators.

“Now, before you can hold any one of these defendants to be bound by this conversation with Mr. Palermo, if you believe there was such a conversation, it would be necessary for you to find from other evidence that such person, as to whom you are making applicable that conversation, was in fact a conspirator.” [12 R.T. 1664-1665.]

After instructing the jury upon the necessary elements of a criminal conspiracy, the district court said:

“Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators may be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making the declaration.

“The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants or either of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you should make the deduction and find accordingly.” [11 R.T. 1630; 50 R.T. 7655-7657.]

The foregoing instructions, as well as the additional instruction given at the request of Gibson [50 R.T. 7713-7715], substantially state the proposition of law which Carbo and Palermo claim was rejected by the court: that the jury must be satisfied that a declarant or actor was a member of the conspiracy before his words or acts in furtherance of the conspiracy and during the period of the conspiracy may be considered against the co-conspirators. However, to the extent that appellants urge that the jury should have been instructed to make a finding upon the *competency* of evidence which has been admitted by the court dur-

ing the presentation of proof, their requested instructions do not state the applicable law and were properly rejected.

In his opinion affirming the conviction of the principal officials of the Communist Party of the United States, Judge Learned Hand analyzed appellants' contention of error and demonstrated its inherent fallacy. His discussion of the question is worth quoting at length:

"All these declarations the judge left to the jury with the following instruction: 'Before you could consider this evidence against the defendants, or any of them, you would have to be convinced beyond a reasonable doubt that the instructor in question was a member of the conspiracy with knowledge of its aims and purposes, and, that the teaching in question was during the period of the indictment and in furtherance of the aims and purposes of the conspiracy. * * * If you are convinced beyond a reasonable doubt that one or more of the defendants knowingly were parties to such conspiracy, you may consider the acts and statements of co-conspirators engaged in the same enterprise and done or said in furtherance of the conspiracy and in the time specified in the indictment, just as though such statements and acts were said and done by the defendant or defendants who were found by you to be members of the conspiracy.' It is not clear in the books that these instructions did not too much confine the jurors' use of the declarations, for it directed them not to regard them at all unless they

were first convinced beyond reasonable doubt that the declarant and the defendants were engaged in a common venture which the declarations helped to realize. *It is difficult to see what value the declarations could have as proof of the conspiracy, if before using them the jury had to be satisfied that the declarant and the accused were engaged in the conspiracy charged; for upon that hypothesis the declarations would merely serve to confirm what the jury had already decided.* In strict logic these instructions in effect altogether withdrew the declarations from the jury, and it was idle to put them in at all. The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but *we think that the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent.* Indeed, it is a practical impossibility for laymen, and for that matter for most judges, to keep their minds in the isolated compartments that this requires. In *United States v. Pugliese*, 2 Cir., 153 F. 2d 497, 500, the charge was against the husband and wife as joint possessors of illegal liquor; and the husband was convicted and the wife was acquitted. The question arose as to the competence of the wife's declaration against the husband, and we

held that they were competent; yet obviously, if the jury used the declarations against the husband they must have done so without being satisfied beyond a doubt that she possessed the liquor in concert with him. Of course, they may have found the evidence against him enough without recourse to the declaration, but they were not so instructed. Instead we said: 'The admissibility of the wife's declarations in the case at bar was for the judge, and the fact that the jury later acquitted her was irrelevant. *The issue before him was altogether different from that before them: he had only to decide whether, if the jury chose to believe the witnesses, Pugliesi and his wife were engaged in a joint undertaking; they had to decide whether they believed the witnesses beyond a doubt.*' No doubt, this conclusion permits the jury to act upon hearsay, because they may be satisfied of the 'joint undertaking' only because of the declaration; but it often happens that hearsay is competent, and this is the only practicable way to deal with the question." [Emphasis supplied.]

United States v. Dennis, 183 F. 2d 201, 230-231 (2 Cir. 1950), affirmed 341 U. S. 494 (1951).

Judge Hand's analysis points up the dichotomy between the function of the court and the function of the jury in weighing evidence in a conspiracy case. The trial judge must determine if a *prima facie* case linking the declarant with the conspiracy has been made out before unconditionally admitting his extrajudicial

declaration against the indicted co-conspirators. It is in connection with this ruling upon *admissibility*, that the Supreme Court cautioned that evidence independent of the declaration must exist before finding the declaration admissible, "Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence."

Glasser v. United States, 315 U. S. 60, 73-75 (1942).

This does not mean that the *jury* must second-guess the trial judge on the question of the *competency* of evidence which he has admitted for their consideration. Their sole function is to consider all of the evidence which the court has admitted to determine whether each person alleged to be a co-conspirator was in fact a conspirator in the conspiracy charged in the indictment. If so, then all acts and declarations of each member of the conspiracy are to be considered in determining the one issue before the jury, to wit: did the prosecution establish beyond a reasonable doubt the existence of the conspiracy charged and the membership therein by each named defendant.

Thus, appellants have misplaced their reliance on the holding of the *Glasser* case. This analysis of the holding of *Glasser* is confirmed by the leading recent commentary on the law of conspiracy which cites the *Glasser* opinion for the proposition that only a *prima facie* foundation by independent evidence of the declarant's

conspiratorial status is necessary in order to *admit* such evidence. *Glasser* has nothing to say on the question of instructing the jury in the use of such evidence once it has been received.

Developments in the Law of Conspiracy, 72 Harv. L. Rev. 920, 984-985; 987, fn. 510 (1959).

The same distinction, between *prima facie* evidence of membership for purposes of admissibility and the use of all admitted evidence for determination of guilt beyond a reasonable doubt, was recognized by Mr. Justice Sutherland, Mr. Justice Stone, and Circuit Judge Clark in their affirmance of the conviction in the *Manton* conspiracy case:

“In the foregoing recital of facts and circumstances, to which others less significant might be added, we have set forth some matters with respect to which Manton’s immediate connection is not shown by the evidence. And we have done so because of the light they shed upon the relevant evidence in respect to Manton’s partnership in the conspiracy and the aid they furnish toward a better understanding of that matter. But in considering the contention that the court erred in submitting to the jury the initial question whether Manton was a party to the conspiracy, we have put these facts and circumstances aside. *Of course, Manton’s partnership in the conspiracy being settled prima facie, these matters become relevant as acts and declarations of co-conspirators in*

the execution of the conspiracy, by which Manton would be bound.” [Emphasis supplied.]

United States v. Manton, 107 F. 2d 834, 843
(2 Cir. 1938), *cert. den.* 309 U. S. 664
(1940).

As Judge Hand noted in *Dennis, supra*, the trial judge must determine if there is a *prima facie* case showing membership in the conspiracy, by evidence *aliunde* the declaration, before admitting the declaration against all conspirators on trial. Once that hurdle has been crossed, the evidence is as competent as all other direct and circumstantial evidence which tends to establish the existence of the conspiracy. The jury may use it in its consideration of the only issue before them: did a membership exist and who was a member of it? To ask the jury to compartmentalize each declaration and decide those two questions by resorting to all the evidence except the declaration, means, in reality, to direct the jury to disregard the declaration altogether until they have decided the question of guilt. At this point in the jury's deliberations the evidence of such declarations would be academic. Furthermore, an instruction which asks the jury to perform such a psychological exercise, is an act of futility, since it conflicts with the instructions upon the use of circumstantial evidence, which are clearly proper in a conspiracy case, as in any criminal case. [50 R.T. 7656-7657.]

(b) *Membership in the Conspiracy.*

If Dragna had complied with this Court's Rule 18(2)(d), his specification of error would have answered itself. [Dragna's Op. Br. 21-26.] He failed

to set forth the instructions which Judge Tolin gave on the proposition that proof of knowledge of the illegal objects of the conspiracy is a necessary element in establishing the membership of each appellant in the conspiracy. The court gave complete instructions and an excellent illustration of this point. [50 R.T. 7653-7655, 7657, 7677-7678.] The Santa Claus story pointedly explained the necessity that the jury find that each appellant had knowledge of the criminal nature of the extortion conspiracy before they could lawfully find him guilty.

3. The Instruction Upon the Use of Good Character Evidence Properly Stated the Applicable Law.

Judge Tolin instructed the jury at some length upon the use of evidence of a defendant's good reputation in the community to suggest the probability that he did not commit the crime charged. [50 R.T. 7695-7699.] Since anything established in the record, indeed the absence of anything in the record, might justify a reasonable doubt in the jury's mind about a defendant's guilt, it follows that if such good reputation evidence is admissible to prove the probability of innocence, such evidence in and of itself might justify the jury in acquitting the defendant. However, that does not mean that the defendant is entitled to an instruction *as a matter of law* in which the trial judge *argues* this inference for the defendant.

Since federal judges *may* comment upon the weight of the evidence, *in their discretion*, it would be a strange rule to *require* the trial judge to assert in all cases, no matter what the state of the record, and no matter whether he thinks the point deserves emphasis or

not, that the jury may acquit solely upon such evidence of good reputation. And this is not the law.

Allen v. United States, 4 F. 2d 688, 694-695 (7 Cir. 1925), *cert. den.* 267 U. S. 597, 598, 268 U. S. 689 (1925);

Linde v. United States, 13 F. 2d 59, 61-62 (8 Cir. 1926).

Johnson v. United States, 269 F. 2d 72 (10 Cir. 1959), cited by Gibson, does not state the majority view. The Tenth Circuit has misinterpreted the holding of *Edgington v. United States*, 164 U. S. 361 (1896). *Edgington* merely holds that evidence of the defendant's good reputation is *admissible* as tending to establish the probability that he did not commit the crime charged. It does not even suggest that the jury must be instructed in accordance with Gibson's Special Instruction F. To the contrary, the opinion suggests that the court should treat good reputation evidence no differently than any other defensive evidence in a criminal case. The Tenth Circuit's view is based neither upon reason nor authority and should not be followed by this Court.

4. The Court Correctly Instructed Upon the Commerce Element in Count One.

Gibson says that the trial judge failed to make a finding upon "whether the prosecution has adduced evidence to demonstrate that the defendant's activities complained of affect interstate commerce. . . ." [Gibson's Op. Br. 56-57.] The district court made such a finding by describing several of the economic facts in the record which if found by the jury to exist (they were not contested by appellants) constituted interstate

or foreign commerce within the meaning of the Hobbs Act, 18 U. S. C. §1951. [50 R.T. 7658-7660, 7667-7668, 7670-7672.]

Abundant evidence was received on the issue of interstate and foreign commerce. The contract for the Jordan-Gutierrez fight at the Olympic Auditorium on January 22, 1959, was negotiated by telephone between Los Angeles, California, and Mexico City, Mexico. Furthermore, the Los Angeles promoters of that fight had discussions concerning this bout with Gutierrez's manager while they were in Mexico City. Finally, the promoters paid the traveling expenses for Gutierrez and his manager from Mexico City to Los Angeles. [18 R.T. 2635-2640; Exs. 116-118.]

The second Jordan-Akins championship fight on April 24, 1959, was nationally televised. The promoter's arrangements for the bout were almost exclusively of an interstate nature. [18 R.T. 2603-2604, 2611-2613.] Title Promotions, Inc., a corporation owned by Gibson, located in Chicago, Illinois, handled the televising of the fight for Muchnick, who was located in St. Louis, Missouri. The sponsor of the television aspects of the bout was the Gillette Safety Razor Company of Boston, Massachusetts. Gillette paid Muchnick \$55,000 from which he disbursed \$15,000 to each fighter for the television rights to his performance, \$12,500 to the Chicago Stadium Corporation, \$6,250 to Title Promotions, Inc., and \$6,250 was retained by Muchnick. [18 R.T. 2620-2621.] It was from Jordan's share of this fund (as well as from his share of the "gate" from paid attendance at the fight) that Carbo's and Palermo's "fifteen percent off the top" was supposed to be paid.

The foregoing evidence, demonstrating the interstate and foreign commerce aspects of the two fights in which Jordan earned purses after becoming welter-weight champion and during the period of the conspiracy, was uncontested at the trial. As Judge Learned Hand said in the *Compagna* case:

“ . . . If these were the facts, the business was interstate as matter of law, and the question should not have been submitted to the jury; and since nobody contested the facts, but only their legal effect, it was unnecessary for the judge to say anything on the issue. . . . ”

United States v. Compagna, 146 F. 2d 524, 527 (2 Cir. 1944), *cert. den.* 324 U. S. 867, *reh. den.* 325 U. S. 892 (1945).

On the conspiracy count the court alluded to some of the facts which establish the probable effect upon commerce which the attainment of the objects of the conspiracy would produce. The court's legal conclusion based upon these facts and the other jurisdictional facts in the record was clearly correct:

“Under the 1934 Act, it was not incumbent upon the prosecution to prove that it was the purpose of the conspiracy to affect interstate commerce. Indeed, in *Nick v. United States*, *supra* [122 F. 2d 673], the court specifically held that it was proper to charge that ‘it is not necessary for the jury to find that the defendants, in conspiring, considered that the effect of their conspiracy would be to affect interstate commerce or that one of the purposes of the conspiracy was to affect such commerce.’ The court stated, ‘All

that is necessary is that the conspiracy shall be to do something, the natural effect of which will be to affect interstate commerce.'

"We have no doubt that the same is true under the statute in its present form and, in this regard, we appear to be in agreement with the Court of Appeals for the Eighth Circuit . . . in *Hulahan v. United States* [214 F. 2d 441, 445-446 (8 Cir. 1954), *cert. den.* 348 U. S. 856)]. . . ."

United States v Varlack, 225 F. 2d 665, 672 (2 Cir. 1955).

If the extortion conspiracy had succeeded, the impact, upon all the parties to the interstate contractual relationships established in the record, and upon national television, would clearly have constituted an effect upon commerce in some "way or degree".

18 U. S. C. §1951.

5. The Jury Was Properly Instructed Upon Proof of Overt Acts.

At one point in its charge to the jury, the district court explained the overt act element in a conspiracy offense as follows:

". . . It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid." [50 R.T. 7645.]

Carbo contends that this was error. [Carbo's Supp. Op. Br. 2, 4-6.] The overt act requirement was cov-

ered at an earlier portion of the charge in accordance with Carbo's view of the law [50 R.T. 7651-7652], but Carbo urges that there is a legal conflict between the two statements of the same rule which prejudiced his case.

In addition to giving instructions upon overt acts, the court read the two conspiracy counts to the jury. Both counts include only overt acts alleged to have been committed by appellants or co-conspirator Daly. [1 C.T. 3-4, 10-11.] Secondly, the substantive counts under 18 U. S. C. §875(b) [Counts Six-Ten] appear as overt acts in the two conspiracy counts. [Count One: paragraphs 4(f), 4(g), 4(1), 4(m); Count Five: paragraphs 4(a)-4(e).]

Appellants Carbo and Palermo were convicted on each of the substantive counts in which they were named. Thus, the jury must have found that these overt acts in the two conspiracy counts had been committed by one or more of the appellants.

Furthermore, the instruction complained of is a correct statement of the law. Title 18, United States Code, Section 2(b), provides as follows:

“Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”

This statute recognizes the principle of criminal agency in the federal law. Since a defendant may be held liable for a completed criminal offense which he causes through another, *a fortiori*, he can be held responsible for the commission of an overt act in furtherance of a conspiracy which he causes through an-

other, since an overt act is one element of the conspiracy offense.

In any event, appellants never suggested to the court that it should make any change in the instruction given until after the jury had returned their verdicts. They waived this contention of error by their silence.

Rule 30, F. R. Crim. P.

With respect to Count One, which was brought under the Hobbs Act, 18 U. S. C. §1951, no instruction upon overt acts was necessary, since the overt act allegations are surplusage in an indictment charging a conspiracy under that statute.

Ladner v. United States, 168 F. 2d 771, 773 (5 Cir. 1948), *cert. den.* 335 U. S. 827 (1948);

United States v. Tolub, 187 F. Supp. 705, 709 (S. D. N. Y. 1960);

United States v. Callanan, 173 F. Supp. 98, 101 (E. D. Mo. 1959), affirmed 274 F. 2d 601 (8 Cir. 1960), affirmed 364 U. S. 587 (1961);

Cf. Singer v. United States, 323 U. S. 338, 340 (1945).

6. Definition of the "Underworld".

Dragna complains that the trial judge did not define "the meaning of the term 'underworld reputations'" for the jury. [Dragna's Op. Br. 20, 38-39.] No request for such a definition was made by appellants, nor did any appellant offer a suggested definition in writing pursuant to Rule 30, F. R. Crim. P. Nor did any appellant object to the court's failure to give an instruction on this subject before the jury retired.

The court's statement before the jury arguments, "I am not going to give the definition of underworld", was in answer to a facetious remark by Palermo's counsel which was certainly not a request that the court give a definition of "underworld reputations". [50 R.T. 6791.]

The phrase is not a term of legal art and its use in the two conspiracy counts [I C.T. 2, 10] was certainly not subject to the ambiguity of meanings suggested by Dragna. It was no more necessary for the court to define the meaning of "underworld reputations" as used therein, than for the court to define the meaning of "gun" in an armed robbery case. If the jury was sufficiently mature to understand the evidence presented in this extortion case, they were not "at sea" on this point.

7. The Aiding and Abetting Instruction Was Proper.

Carbo fears that the jury was confused by the instruction on the aiding and abetting statute, 18 U. S. C. §2. [Carbo's Op. Br. 33-35, 65-66.] It is clear that the instruction [50 R.T. 7714-7716] was applicable to Count Four which names Palermo and Sica jointly. [I C.T. 8.] Appellants did not request that the court limit the instruction to this count. The only objection raised before the jury retired failed to suggest any prejudice in the instruction. [50 R.T. 7719-7720.] There was no danger that the jury would misinterpret the instruction and convict any appellant under a count *in which he was not charged*.

Furthermore, the instruction related the two conspiracy counts to the eight substantive counts, which, as a factual matter, were mutually interdependent. The

relationship of appellants Gibson and Dragna, who were charged exclusively in the two conspiracy counts, to the commission of the substantive offenses by the other three indicted co-conspirators is certainly material to the jury's evaluation of Gibson's and Dragna's guilt or innocence under the conspiracy counts. Gibson and Dragna might well have been charged with one or more of the substantive crimes in this indictment under the theory of the *Pinkerton* case. The fact that they were not so charged does not mean that the evidence does not prove their status as principals to these substantive offenses, thereby shedding light upon their roles in the conspiracy.

Pinkerton v. United States, 328 U. S. 640 (1946);

Nye & Nissen v. United States, 336 U. S. 613, 619 (1949).

Carbo has failed to show how the instruction prejudiced him or any other appellant.

8. The District Court's Cautionary Admonition to the Jury Was Beneficial Rather Than Detrimental to Gibson.

During their deliberations, the jury requested to hear one of the tape recordings which had not been played during the presentation of evidence. [Ex. 176, which is substantially identical with Ex. 100, which was played during appellee's case-in-chief.] Before playing Exhibit 176, the court, out of an abundance of caution, restated its prior warning that the Daly-Leonard conversation could only be considered by them if they were satisfied that Daly was either a conspirator as charged or an agent of one of the conspira-

tors. [50 R.T. 7789.] Gibson contends that this admonition was prejudicial error, although he made no objection thereto during the trial. [Gibson's Op. Br. 55-56.]

Rule 30, F. R. Crim. P.

There was no necessity for the court to remind the jury that the exhibit could only be used against appellants under certain conditions. To repeat this admonition during the jury's deliberations certainly was not helpful to the prosecution. Insofar as the court's use of the word "agent", Daly's statements to Leonard were admissible against the appellants under the agency theory whether or not he was named in the indictment as a co-conspirator.

Fuentes v. United States, 283 F. 2d 537, 539-540 (9 Cir. 1960).

Finally, Gibson is unclear as to why, after three and one-half months of side bar conferences out of the hearing of the jury, he could not object to the instruction, if its effect was so prejudicial to his theory of defense. Gibson did not preserve the point below, his brief does not comply with Rule 18(2)(d), and, on the merits of the question, the contention of error is without substance.

9. The District Court Instructed the Jury Properly and Repeatedly on Reasonable Doubt and the Presumption of Innocence.

Palermo alleges plain error, because the court did not emphasize to the jury under what circumstances they had a duty to acquit the appellants. [Palermo's Op. Br. 7, 13-16.] The court instructed on the test for

conviction and acquittal, although not in the words selected by Palermo's counsel. Appellants offered no amendment to the court's instruction before the jury retired. An extensive instruction was given upon reasonable doubt at the outset of the court's charge to the jury. [50 R.T. 7638-7641.] In the course of that instruction, Judge Tolin told the jury:

“. . . And, whenever, after a careful consideration of all of the evidence, your minds are in the state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, *the conclusion of innocence must be adopted.*” [Emphasis supplied.] [50 R.T. 7641.]

Then, in connection with his statement of the elements of the offenses charged in each of the counts in the indictment, Judge Tolin repeatedly stated the rule on burden of proof. [50 R.T. 7653-7654, 7666-7667, 7669-7672, 7680-7686.]

Appellee submits that “the conclusion of innocence” which “must be adopted” is the legal equivalent of a “verdict of not guilty”:

“The court is not bound to accept the language which counsel employ in framing instructions, nor is it bound to repeat instructions already given in different language. . . .”

Agnew v. United States, 165 U. S. 36, 51 (1897).

Failure of so many experienced counsel to notice any deficiency in the court's instructions upon reasonable doubt and the presumption of innocence sug-

gests *prima facie* that the *plain error* suggested by Palermo did not occur. The instructions cited and quoted, above, settle the matter conclusively.

10. The Jury Was Not Lulled Into Apathy by the General Instruction Upon the Division of Functions Between the Court and Jury.

“ ‘When *I* use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’ ”

“ ‘The question is,’ said Alice, ‘whether you *can* make words mean so many different things.’ ”

“ ‘The question is,’ said Humpty Dumpty, ‘which is to be master—that’s all.’ ”

Lewis Carroll, *Through the Looking Glass* (The New American Library: New York, 1960)
Chapt. VI, p. 186.

Like Humpty Dumpty, Carbo puts his unique gloss upon the beginning of the district court’s charge to the jury. [Carbo’s Supp. Op. Br. 1-2, 3-4.] Making words mean “so many different things”, he urges this Court to read Judge Tolin’s caution to the jury positively backwards. His looking glass interpretation is reinforced by quoting the remarks out of context. The full statement was as follows:

“At the close of all of the proceedings, prior to your deliberation, it becomes the duty of the judge to instruct you upon the law. You should always remember in our judicial system in these federal courts there is a sharp, very sharp difference between your duties as a jury and mine as the judge. The judge has the duty to research the law that is applicable to the case and

to state it for you. It would be very nice if it could be stated in something short like the Ten Commandments, but our law just cannot be so concise.

“You have the sole duty of deciding the facts, and I have no right to enter into that fact duty, that is, I cannot come over and be a member of you, nor can you come up here and look into the law.

“If I am wrong in what I tell you and it is a serious matter—if it is just trivia I might get a little reprimand for it from a higher court, but if it is just trivia it is not fatal to your verdict. If I seriously misinstruct you, then any verdict you return would be vitiated. *In other words, my word is subject to a review by higher courts; yours is not.*

“You are the finder of the fact. I didn’t say ‘finders’, I said ‘finder’, because unanimity is required.

“It is contemplated you will take whatever time is necessary. I have had a lot of cases where the matter of an hour or so has been all that was necessary. I have had short cases in which a matter of a couple of days have been necessary. You take whatever time is necessary, but come to one mind on this case. Your verdict must be unanimous.

“*Now, the reason why your decision on the facts is not subject to review on appeal is simply that this has been a trial in open court. Any reasonably competent, trained lawyer can find out what the law is. Any reasonably competent ap-*

pellate judges can determine whether that lawyer has done well on his advising the jury as to the law. But an appellate court, if they come to a review of this case, which we don't know—it is in the potential that they might—that appellate court will not see the witnesses. You have seen them from the time they came forward to take the oath until they left the stand, and that visual attention which you have given to the witnesses, your observation of the way in which they respond, the kind of people they are, is something that just cannot be picked up from a stenographic transcription of what went on here.

“Therefore, since these intangibles enter so so greatly into the appraisal of the witnesses’ testimony, it is said that only those who saw and heard the witnesses are to judge what is true, what is confused, what is false. *Hence, you are the sole judges of the evidence*, but you must take the law as the judge declares it.” [50 R.T. 7634-7636. Emphasis supplied.]

The jury was not lulled into any state of apathy based upon a false impression that their verdict on the facts was only tentative and not final—unless they were deaf.

D. Appellants’ Supplementary Motions for New Trial Based Upon Judge Tolin’s Death Were Properly Denied.

It is well established that if the trial judge dies after the jury returns a verdict, but before disposition of post-verdict motions, entry of judgment of

conviction, and pronouncement of sentence, another judge may perform these functions.

Rule 25, F. R. Crim. P.;

Connelly v. United States, 249 F. 2d 576 (8 Cir. 1957), *cert. den.* 356 U. S. 921, *reh. den.* 356 U. S. 964 (1958).

See also:

Miller v. Pennsylvania Railroad Co., 161 F. Supp. 633 (D. C. D. C. 1960).

An exception arises *only* when the successor judge, in his discretion, finds that he cannot satisfactorily perform such functions by reason of the fact that he did not preside at the trial or for some other reason.

Rule 25, F. R. Crim. P.;

Miller v. Pennsylvania Railroad Co., *supra*.

Rule 25 affords a defendant due process of law within the meaning of the Fifth Amendment to the Constitution.

Connelly v. United States, *supra*.

Case law on the subject is meager, but it is apparent that the death of the trial judge subsequent to jury verdict is not, in itself, sufficient ground for ordering a new trial. Rule 25 provides for assignment of the case to a successor judge. This is not an innovation in the law. In 1834, in *New York Life and Fire Insurance Company v. Wilson*, 8 Peters (33 U. S.) 290, 303, 8 L. ed. 949 (1834), the Supreme Court pointed out that, "The court remains the same, and the charge [*sic*] of the incumbents cannot

and ought not, in any respect, to injure the rights of litigant parties.”

Rule 25 requires only that the successor judge examine the record and arrive at a preliminary determination with respect to his ability to perform those judicial functions which remain at the district court level. If he should decide that he cannot perform those duties, “he may in his discretion grant a new trial.”

Rule 25, F. R. Crim. P.;

Connelly v. United States, supra.

Jury trial in the instant case commenced on February 21, 1961, and was completed on May 30, 1961. Judge Tolin set July 20, 1961, for argument on motions for new trial. On June 11, 1961, before he could hear oral argument or dispose of said motions, he passed away. On June 26, 1961, the case was reassigned to the Honorable George H. Boldt, United States District Judge, for all further proceedings; whereupon, each of the appellants filed supplemental motions for new trial, contending that a successor judge could not properly discharge the judicial functions remaining at the time of Judge Tolin's demise. On July 24, 1961, Judge Boldt heard extended oral argument concerning both the supplemental motions for new trial and the motions for new trial on the merits. On October 13, 1961, Judge Boldt denied the supplemental motions for new trial, holding that:

“The record clearly shows that the able and experienced trial judge conducted the entire proceeding with remarkable patience and restraint, giving fair and thoughtful attention to the fre-

quent and numerous objections and contentions presented by veteran and vigorous counsel. From a review of the entire record it appears to my complete satisfaction that all judicial duties and functions subsequent to verdict, including evaluation of the evidence for all necessary purposes, can and should be performed by a successor judge. To do so will require much time, effort and concern. Such considerations, however, will not justify evasion of judicial duty by the simple and easy solution of granting a new trial.” [VI C.T. 1343.]

Concurrent with his denial of the supplemental motions, Judge Boldt had already completed a 2,000 page rough draft of an abstract of testimony summarizing the 7,500 page trial record. [VI C.T. 1447.] This abstract was further condensed and is part of the record on appeal. The Abstract of Testimony consists of 1,320 pages and is in ten volumes. It should be dispositive of the question herein raised by the appellants, since it demonstrates the thorough study and analysis given by the successor judge to all of the evidence and issues in the case. Moreover, the successor judge has laid to rest the erroneous assertions of appellants to the effect that appellee’s case was based solely upon the credibility of Jack Leonard. Judge Boldt emphasized in his Memorandum Order, dated November 28, 1961 [See: Appendix D, below]:

“ . . . The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesseth or both. Their testimony in all essential particulars was fully and convincingly corroborated. . . .” [VI C.T. 1448.]

Suffice it to say, the difficulty of a task does not determine the *possibility* of its accomplishment, nor does the intricacy of the legal issues compel a conclusion that they defy analysis by an experienced lawyer and trial judge. Appellants are saying very little when they refer to the length of the transcripts and the number of witnesses and exhibits to be found therein. To be sure, there are over 7,500 pages of testimony, and, as the successor judge himself pointed out, “359 exhibits were marked and 264 admitted in evidence, including several recordings.” [VI C.T. 1446.]

Yet, the case can be understood by reading the record and reflecting upon it. This is obviously the task which the successor judge undertook for himself in the fulfillment of his duties as a United States District Judge.

It defies reason to suggest that a lengthy case such as this should be retried after the verdict of the jury simply because another judge sitting on the same court as the trial judge with jurisdiction over the appellants must rule on post-trial motions. This is particularly true where an extremely experienced successor judge has demonstrated his understanding of the trial record and has concluded that there is no problem of credibility.

Appellants cite numerous cases in support of their contention that a successor judge cannot fulfill the duties of the trial judge.

Brennan v. Crisco, 198 F. 2d 532 (D. C. Cir. 1952), is a civil case in which the trial judge sat as the finder of fact. At the time of his demise, he had not made findings of fact or filed conclusions of law.

Federal Deposit Insurance Company v. Siraco, 174 F. 2d 360 (2 Cir. 1949), was also a non-jury case in which the successor judge was called upon to make findings of fact.

In *Smith v. Dental Products Co.*, 168 F. 2d 516 (7 Cir. 1948), the master died before making findings of fact or filing a report. Here again, there was no jury.

In the case of *In re Linahan*, 138 F. 2d 650 (2 Cir. 1943), the court was concerned with the alleged bias of a referee appointed by the district judge and the case has little significance for interpretation of Rule 25.

In *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F. 2d 77 (2 Cir. 1949), there is no mention of a successor judge and the case was on the civil calendar. The decision discusses the credibility of the plaintiff's witnesses.

In *United States v. Page*, 302 F. 2d 81 (9 Cir. 1962), there was no successor judge involved and no problem arose under Rule 25.

Miller v. Pennsylvania Railroad Co., *supra*, is a district court decision in which Judge Holtzoff, sitting as successor judge in a civil case, reviewed the evidence and granted a motion for new trial. The case simply illustrates that a successor judge can weigh the evidence. Judge Holtzoff points out that:

“It is also necessary to bear in mind the necessity of undertaking the task in the spirit of what is known as the ‘harmless error’ rule. . . . This rule is quoted and must be stressed because unfortunately its mandate, in fact its very existence,

is frequently overlooked and at times even forgotten. It must not be permitted to wither and atrophy. It will not do to render purely lip service to this basic doctrine of modern administration of justice. We must not 'keep the word of promise to our ear, and break it to our hope.' Philosophically, rules of law are but a means to an end and not an end in themselves. Their objective is the achievement of substantial justice."

Miller v. Pennsylvania Railroad Co., supra, at p. 636.

It goes without saying that a trial judge has the power to grant a new trial and that in doing so he may consider not only what the witnesses said but their demeanor on the witness stand. However, in the year 1962, we are several steps beyond the superstitions and old-wives tales which teach that a witness is lying if his hands perspire, if he neglects to look his questioner in the eye, if he looks nervously around the courtroom, or if he stares at his feet, etc., through a catalogue of physical behavior which usually has questionable significance in the ascertainment of the truth. Indeed, one must know a great deal about a person before he can say that a particular behavior phenomenon indicates perjury. Some people have nervous giggles; others, twitches; some are myopic; others have glandular defects causing their hands to perspire. The pathological liar may look his questioner straight in the eye and be extremely persuasive during the short period of time he is on the witness stand. The usual trap for the pathological liar is the failure of his story to hang together internally and to jibe with the other evidence in the case.

In any event, new trials are not a matter of course and a preponderance of the evidence must appear in favor of the defendant before such a motion will be favored. As the court said in *United States v. Robinson*, 71 F. Supp. 9, 10-11 (D. C. D. C. 1947), citing *Metropolitan Railroad Co. v. Moore*, 121 U. S. 558-570, and other cases:

“ . . . If the Court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. Naturally, *this authority should be exercised sparingly and with caution. It should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.*” [Emphasis supplied.]

The record in the instant case is replete with instances of *absurd* testimony by appellants and witnesses called on their behalf. Because of the length of this brief, we will not attempt to collect more than a sample, but the Court might note:

1. Palermo's testimony that he did not believe in banks so he carried \$3,000 in currency in his “kick” [40 R.T. 5965];

2. Glickman's testimony that he “loaned” \$10,000 in currency to Carbo without a receipt to record the transaction [29 R.T. 4270-4271];

3. Gibson's sophistic distinctions between “knowing” Carbo and “meeting” Carbo [32 R.T. 4755, 4759];

4. Gibson's argumentative answers concerning whether he had a “conversation” or a “discussion” with Carbo [33 R.T. 4940];

5. Gibson's misleading the jury with respect to missing financial records; [Exs. Z-36, Z-37, 133; Cf. 29 R.T. 4354 and 30 R.T. 4379 with 30 R.T. 4388 and 30 R.T. 4421];

6. Gibson's denial that he knew Viola Masters as Mrs. Carbo followed by a later admission that he was introduced to her as Mrs. Carbo [32 R.T. 4661-4671];

7. Palermo's testimony that "We have been doing this for years. This is the first time this kind of case came about" [40 R.T. 5955];

8. Palermo's *explanation* for his use of fictitious names and addresses: that he was a "character" [39 R.T. 5845-5847];

9. Jordan's arrogant and insolent response to the question asking him to relate what Dragna had said to him:

"He said, 'Roses are red, violets are blue; 'Besamay kulo y alva fong ku.'" [26 R.T. 3778-3779]; and

10. Jordan's incredible refusal to admit the fact that he had testified before the Grand Jury and sworn to the exact opposite of what he testified as a witness for Palermo. [26 R.T. 3793-3808.]

For further demonstration of the quality of evidence presented by the prosecution and the absence of any real question of credibility, we respectfully direct the Court's attention to the Statement of Facts, and to the section of the Argument concerning the sufficiency of evidence, above. All of the appellants strenuously attacked the credibility of prosecution witnesses in their arguments to the jury. Leonard was described

as a liar on literally scores of occasions during final argument. But the jury rejected this attempt to blitzkrieg Leonard. Judge Tolin pointedly reminded the jury that they were the ultimate judges of credibility and he implied that he would not disturb their findings in that respect. [50 R.T. 7691-7695, 7724, 7726.]

When defendants in a criminal case decline to waive a trial by jury, they implicitly agree that they are willing to abide by the findings of fact of the twelve persons selected to sit in the jury box. When appellate courts review a criminal conviction, they seldom pause to comment upon the trial judge's denial of motions for new trial. As Judge Learned Hand stated in *United States v. Compagna*, 146 F. 2d 524, 526 (2 Cir. 1944); *cert. den.* 324 U. S. 867, *reh. den.* 325 U. S. 892 (1945):

“As is so often the case in criminal appeals, we are asked to reverse the conviction because the testimony on which the verdict was based was incredible; as always, we reply that that question is not for us, but for the jury. If, viewing the situation as a whole, they chose to believe Bioff, their conclusion was final. . . .”

Appellants further contend that Judge Tolin's medical history somehow denied them a fair trial. Despite almost four months of trial, there is nothing in the record to suggest, even remotely, that this is any more than an afterthought by appellants who now seek some advantage in the untimely death of the trial judge. As a matter of fact, Judge Tolin's health was such that he conducted a jury trial in a bank robbery case during the one week recess in this case, provided so

that counsel for appellants might prepare their defense. [*Toles v. United States*, 9 Cir. No. 17682.] We note, in passing, that appellants were not bashful about advancing any other objections or comments during the course of the trial which might memorialize alleged error in the record. Their general lack of restraint throughout the trial, and their failure to make known their concern for Judge Tolin's health during the trial demonstrates that their present suggestion that, ". . . he *may* have been unable to proceed with the required fairness and impartiality," is an argument of convenience of the most improper kind. [Gibson's Op. Br. 60. Emphasis supplied.]

VII. CONCLUSION.

The case reveals a criminal conspiracy of vast proportions which continued to operate for an extended period of time because of the intense fear induced in the victims. Although the public at large is certainly affected by conduct of the type indulged in by the appellants, it is only when the case is viewed from the immediate victims' point of view that it's truly obnoxious and intolerable character is seen in perspective. For Leonard and Nesseth, particularly for Leonard, the period of October 23, 1958 through the trial was a period of terror during which events transpired that should be unknown under the laws of the United States.

Certain of the appellants have alleged misconduct by the appellee and during their final argument compared the prosecution to a phenomenon which might occur in a totalitarian society. [See *e.g.*, 48 R.T. 7202,

7214.] However, they are hard-put to demonstrate the truth of their slander. From any rational view of the evidence, it is apparent that every protection was afforded the appellants. It should be noted that there were no illegal wire taps, no unlawful searches and seizures, no coerced confessions, no illegal detentions, and no deprivation of the right to counsel. Nothing occurred which could in any way deny to appellants their constitutional right to a fair trial, pursuant to the due process of law.

It is characteristic of a democratic society that the judicial process proceeds deliberately in criminal matters. In an extortion case such as this, it is difficult for the Government to obtain the quality of evidence necessary to a criminal prosecution in a court of the United States. Appellee's case was presented by convincing direct and circumstantial evidence, unaided by the direct testimony of appellants' accomplices. Since extortion feeds upon fear, it is difficult to uncover even the *fact* of the crime, and witnesses who can bring its perpetrators to justice do not readily come forward. The only feature of this case which bears the mark of totalitarian methods is the crime itself: appellants' systematic use of terror to achieve monopolistic control of a national industry. In this respect, at least, the term "underworld" has pertinence and meaning for this case, since the underworld's methodology for control was exposed during this prosecution.

This is not one of those outrageous cases in which notorious defendants have been denied due process of law. Nor is there any meaningful comparison to be made between the case at bar and the Apalachin conspiracy prosecution, *United States v. Bufalino*, 285 F. 2d 408 (2 Cir. 1960), nor with *Krulewitch v. United States*, 336 U. S. 440 (1949). Appellants had an eminently fair trial. Although the record may reflect the scars of courtroom combat, the case was tried under the adversary system, and the prosecution, as well as the defense, must operate within the idiom of that system.

The trial judge took special pains to insure that appellants would not suffer from any surprise in the prosecution's conspiracy case. After appellee had rested its case-in-chief, when the Government's evidence was completely revealed to the defense, Judge Tolin gave appellants a one week recess, so that they could re-evaluate the case which they had to meet and marshal their defenses accordingly. In general, the district court allowed appellants tremendous latitude in presenting their case. Judge Boldt, the successor judge, was struck by this fact as he noted in his memorandum order of November 28, 1961. [VI C.T. 1446.]

Appellants have had their day in court and their guilt has been proved beyond any doubt pursuant to law. The proceedings have been lengthy. Nearly three years have elapsed since the return of the indictment. As a result of the unfortunate passing of Judge Tolin

after the trial had concluded, the record has been thoroughly reviewed by another experienced trial judge who found no substance in appellants' contentions of error.

In affirming the convictions of conspirators whose extortion scheme bore striking similarities to appellants', Judge Hand wrote:

" . . . The crime struck at the heart of civilized society; its very possibility is a stain upon our jurisprudence. . . ."

United States v. Compagna, 146 F. 2d 524, 529
(2 Cir. 1944), *cert. den.* 324 U. S. 867,
reh. den. 325 U. S. 892 (1945).

The trial was fair, the crimes were proved, and the judgments of conviction should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT E. HINERFELD





APPENDIX A: CHRONOLOGICAL TELEPHONE RECORDS CHART — CALLS IN EVIDENCE

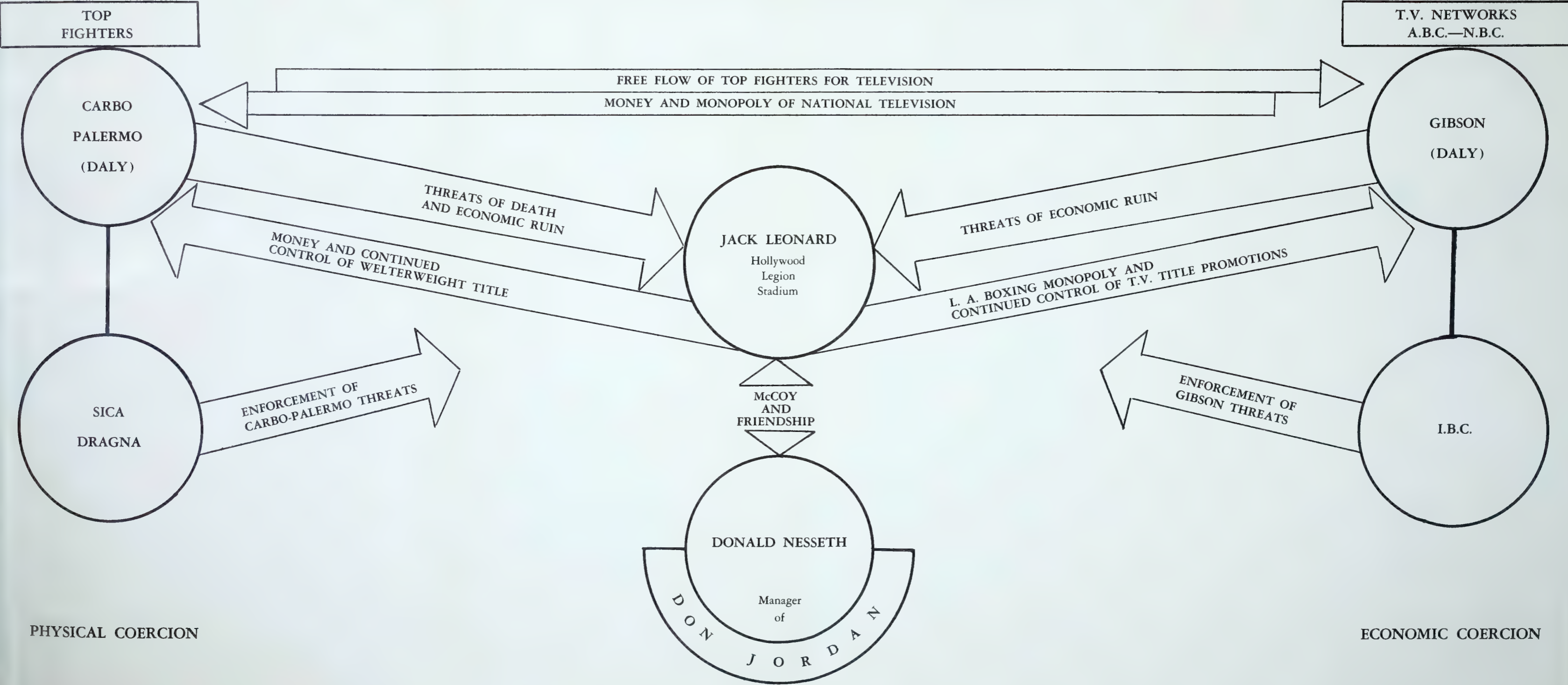
From					To								
	DATE	CONNECTING TIME WHERE INITIATED	DURATION		INITIATING TELEPHONE NUMBER	CITY & STATE OF INITIATING TELEPHONE	SUBSCRIBER OR BLDG. LOCATION OF INITIATING TEL. NO.	RECEIVING TELEPHONE NUMBER	CITY & STATE OF RECEIVING TELEPHONE	SUBSCRIBER OR BLDG. LOCATION OF RECEIVING TEL. NO.	EXHIBIT	ADDITIONAL TOLL SLIP DATA	REMARKS
1	10-23-58	8 :32 am	1	—	DU 7-7011	L.A., Cal.	Ambassador Hotel	DI 5-2424	Reseda, Cal.	Jack Leonard	86-E	[From Rm. 5A] Truman Gibson	
2	10-23-58	— — am	1	—	DU 7-7011	L.A., Cal.	Ambassador Hotel	SE 3-5455	Chicago, Ill.	Chicago Stadium	86-D	[From Rm. 5A] Gipson	
3	10-23-58	— — am	6	—	DU 7-7011	L.A., Cal.	Ambassador Hotel	CE 6-0123	Chicago, Ill.	Bismarck Hotel	86-C	[From Rm. 5A] Gibson [to] Palermo	
4	10-24-58	2 :59 pm	—	21	DU 2-9869	L.A., Cal.	Pub. Phone—Keeser Drugs	CE 6-0123	Chicago, Ill.	Bismarck Hotel	2	[From] Jack Lenard [to] Palaremo Rm. 833—Bill to HO 5-3303	See : Exs. 3, 4, 72 ; 12 R.T. 1761-1763 ; 14 R.T. 2062 ; 12 R. T. 1738-1739
5	12-17-58	12 :17 pm	5	—	HO 5-3303	L.A., Cal.	Legion Stadium	FU 9-2664	Phila., Pa.	Felix Corey	10	[Sta. to Sta. Direct Distance Dialing]	
6	1- 1-59	11 :12 am	4	14	HO 5-3303	L.A., Cal.	Legion Stadium	HI 9-1585	Upper Darby, Pa.	Margaret Dougherty	11	[From] Jack Leonard [to] Bodone Bill to L.A. HO 5-3303	
7	1- 2-59	8 :16 am	2	42	DI 5-2424	Reseda, Cal.	Jack Leonard	JE 8-4304	Miami, Fla.	—	12	[From] Jack Leonard [to] Chris Dundee [After Ringing] JE 1-0477—Bill to L.A. HO 5-3303	
8	1- 6-59	— — pm	—	—	—	Hollywood, Fla.	Blue Mist Motel	DI 5-2424	Reseda, Cal.	Jack Leonard	107-C	[From] Tobias, Collect	
9	1-27-59	5 :23 pm	5	53	HO 2-9597	L.A., Cal.	Pub. Phone—Hypure Drug Co.	FU 9-2664	Phila., Pa.	Felix Corey	13	[Sta. to Sta.] 18 Quarters, 3 Dimes, 2 Nickels	Indictment : Counts 2, 3, 6 & 7
10	2- 6-59	1 :40 pm	1	55	ST 6-6038	Van Nuys, Cal.	Jack Leonard	CI 5-8100	N.Y., N.Y.	I.B.C. of N.Y.	14	[From] Jack Lenard [to] Truman Gibson Bill to HO 5-3303	
11	2-10-59	12 :08 pm	4	47	SE 3-5121	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	37	[To] Leonard	
12	2-10-59	10 :27 am	2	—	HO 5-3303	L.A., Cal.	Legion Stadium	SE 3-5317	Chicago, Ill.	Chicago Stadium	18	[Sta. to Sta. Direct Distance Dialing]	
13	2-12-59	3 :42 pm	4	1	HO 5-3303	L.A., Cal.	Legion Stadium	UN 5-7561	Miami Beach, Fla.	Carillon Hotel	15	[To] Truman Gibson	
14	4-12-59	10 :19 am	4	29	HO 5-3303	L.A., Cal.	Legion Stadium	HI 9-1585	Upper Darby, Pa.	Margaret Dougherty	16	[To] Bedone	
15	4-27-59	1 :43 pm	6	8	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-1091	L.A., Cal.	Legion Stadium	45	[To] Leonard [After Ringing] HO 5-3303	
16	4-28-59	7 :38 pm	6	36	FU 9-6441	Phila., Pa.	Felix Corey	HO 5-3303	L.A., Cal.	Legion Stadium	21	[To] Jack Leonard [6038 Crossed Out]	Indictment : Count 9
17	4-28-59	7 :49 pm	—	30	FU 9-6441	Phila., Pa.	Felix Corey	HO 5-3303	L.A., Cal.	Legion Stadium	22	[Sta. to Sta.]	Indictment : Count 8
18	4-29-59	11 :20 am	5	10	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	40	[To] Leonard [After Ringing] ST 6-6038	
19	4-29-59	1 :11 pm	5	6	MA 6-8762	Phila., Pa.	—	SE 3-5121	Chicago, Ill.	Chicago Stadium	39	[To] Truman Gibson [From] Frank, Collect	

Continued on Next Page

APPENDIX A, Continued

From											To										
	DATE	CONNECTING TIME WHERE INITIATED	DURATION MINS.	SECS.	INITIATING TELEPHONE NUMBER	CITY & STATE OF INITIATING TELEPHONE	SUBSCRIBER OR BLDG. LOCATION OF INITIATING TEL. NO.	RECEIVING TELEPHONE NUMBER	CITY & STATE OF RECEIVING TELEPHONE	SUBSCRIBER OR BLDG. LOCATION OF RECEIVING TEL. NO.	EXHIBIT	ADDITIONAL TOLL SLIP DATA		REMARKS							
20	4-29-59	12 :46 pm	1	51	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	44	[Sta. to Sta.]									
21	4-29-59	1 :47 pm	1	27	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	41	[Sta. to Sta.]									
22	4-29-59	3 :15 pm	3	40	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	42	[Sta. to Sta.]									
23	4-29-59	7 :20 pm	4	30	DA 4-5311	Phila., Pa.	————	NO 7-5978	Chicago, Ill.	Truman Gibson	23	[To] Truman Gibson [From] Palermo, Collect									
24	4-29-59	10 :58 pm	3	54	FU 9-6441	Phila., Pa.	Felix Corey	ST 6-6038	Van Nuys, Cal.	Jack Leonard	20	[To] Jack Leonard		Indictment : Count 10 See : 4 R.T. 469-474 ; 5 R.T. 682-683							
25	4-29-59	11 :05 pm	3	8	FU 9-6441	Phila., Pa.	Felix Corey	NO 7-5978	Chicago, Ill.	Truman Gibson	25	[Sta. to Sta.]									
26	4-29-59	11 :28 pm	5	27	LO 8-3937	Englewood, N.J.	William Daly	ST 6-6038	Van Nuys, Cal.	Jack Leonard	31	[To] Jackie Leonard									
27	4-29-59	11 :55 pm	3	3	FU 9-6441	Phila., Pa.	Felix Corey	NO 7-5978	Chicago, Ill.	Truman Gibson	24	[Sta. to Sta.]									
28	4-30-59	10 :01 am	6	46	SE 3-5121	Chicago, Ill.	Chicago Stadium	ST 6-6038	Van Nuys, Cal.	Jack Leonard	47	[To] Leonard [From] Truman Gibson									
29	4-30-59	11 :44 am	4	10	SE 3-5317	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	43	[Sta. to Sta.]									
30	4-30-59	1 :14 pm	7	42	SE 3-5121	Chicago, Ill.	Chicago Stadium	HO 5-3303	L.A., Cal.	Legion Stadium	49	[Sta. to Sta.]									
31	4-30-59	3 :51 pm	16	6	SE 3-5121	Chicago, Ill.	Chicago Stadium	HO 5-1091	L.A., Cal.	Legion Stadium	48	[Sta. to Sta.]									
32	4-30-59	4 :09 pm	5	13	SE 3-5121	Chicago, Ill.	Chicago Stadium	HO 9-2951	L.A., Cal.	Legion Stadium	46	[Sta. to Sta.]									
33	5- 1-59	— —	2	—	CE 6-0123	Chicago, Ill.	Bismarck Hotel	FU 9-6441	Phila., Pa.	Felix Corey	74	[Sta. to Sta. From Rm. of Frank Palermo]									
34	5- 1-59	— —	17	—	CE 6-0123	Chicago, Ill.	Bismarck Hotel	RI 8-4009	L.A., Cal.	Olympic Auditorium	75	[From Frank Palermo's Rm. to] Parnasols									
35	5- 1-59	— —	3	—	CE 6-0123	Chicago, Ill.	Bismarck Hotel	HO 5-3303	L.A., Cal.	Legion Stadium	76	[Sta. to Sta. From Rm. of Frank Palermo]									
36	5- 3-59	1 :30 pm	19	4	HO 5-3303	L.A., Cal.	Legion Stadium	NO 7-5978	Chicago, Ill.	Truman Gibson	17	[To] Truman Gibson									
37	5- 5-59	12 :06 am	12	30	NO 7-5978	Chicago, Ill.	Truman Gibson	CR 4-7777	B.H., Cal.	Beverly Hilton Hotel	34	[To] Geo. Tobias, Rm. 663 Beverly Hilton Hotel									
												Rm. Tele Da by Opr. 323 WH 05 Opr. 761									
38	5-11-59	1 :42 am	10	—	LO 8-3937	Englewood, N.J.	William Daly	HI 9-1585	Upper Darby, Pa.	Margaret Dougherty	30	[Sta. to Sta. Direct Distance Dialing]									

APPENDIX B: SCHEMATIC REPRESENTATION OF THE CONSPIRACY









APPENDIX C.

Judge Boldt's Order Denying Supplemental Motions for New Trial.

"On May 30, 1961, defendants were found guilty by jury verdict of all counts charged against each defendant respectively in a ten-count indictment. Following return of the verdict the late Honorable Ernest A. Tolin, judge of the above-entitled court who presided throughout the trial of the case, denied the motions for judgment of acquittal of defendants Carbo, Palermo, Sica and Gibson. The motion for acquittal of defendant Dragna was taken under submission. Time was allowed and specified for the service and filing of supporting and opposing memoranda on motions of all defendants for new trial. At the time of Judge Tolin's death on June 11, 1961, sentence had not been imposed on any defendant, and ruling had not been made on the Dragna motion for acquittal, a written acquittal motion of defendant Gibson or on any of the new trial motions.

"On June 26, 1961, by order of Chief Judge Hall pursuant to Fed. Crim. Rule 25, this cause was assigned to the undersigned as successor judge for the conduct of all further proceedings herein. All defendants filed supplemental motions for new trial on the asserted ground that judicial duties in the case cannot be performed properly by a successor judge.

"The cited rule provides that if a successor judge be satisfied he cannot perform the duties to be performed by the court after verdict because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial. Specific determina-

tion of that matter by a successor judge prior to and separate from decision on other pending motions is indicated by the language of the rule and the nature of the question presented. The supplemental motions have now been fully considered on the memoranda and oral argument submitted to the undersigned and on the entire record, including the 7,500 page transcript of the evidence and trial proceedings.

“The supplemental motions are principally based on the contention that because a successor judge was not present at the trial he cannot acquire ‘the feel of the case’ sufficiently to understand and exercise sound discretion in various matters including appraisal of the credibility of the evidence supporting the verdict. In order to fully and fairly consider this contention an extensive and detailed study has been made of all testimony and proceedings in the case. A complete and detailed abstract thereof has been prepared which, when typed in final form, will be filed as an appendix to this order.

“The record clearly shows that the able and experienced trial judge conducted the entire proceedings with remarkable patience and restraint, giving fair and thoughtful attention to the frequent and numerous objections and contentions presented by veteran and vigorous counsel. From a review of the entire record it appears to my complete satisfaction that all judicial duties and functions subsequent to verdict, including evaluation of the evidence for all necessary purposes, can and should be performed by a successor judge. To do so will require much time, effort and concern. Such considerations, however, will not justify evasion

of judicial duty by the simple and easy solution of granting a new trial. After extensive consideration of the matter I have reached the firm conclusion and conviction that a successor judge, within the limits of his character, ability and experience, can decide all undetermined issues in the case without impairment in any respect or degree of the lawful rights of any defendant. Accordingly, without prejudice to or ruling on any other contention asserted in any other pending motion, it is hereby

“ORDERED that each and all of the defendants’ supplemental motions for new trial be and the same hereby are denied. Exception allowed to each defendant.

“Dated this 13th day of October, 1961.

Geo. H. Boldt

United States District Judge”

[VI C.T. 1342-1344.]

APPENDIX D.

Judge Boldt's Memorandum Order.

"Jury trial of this case from February 21 to May 30, 1961 was conducted by the late Judge Ernest Tolin. On the latter date a verdict was returned finding each of the five defendants guilty as charged in the ten count indictment. Eight counts charged substantive violations of 18 U. S. C. 875(b) and 1951 and two counts charged conspiracies to violate the cited sections. Each defendant was separately represented by one or more trial counsel. A total of 77 witnesses testified, almost all being interrogated by each of the attorneys and several were examined in great detail. 359 exhibits were marked and 264 admitted in evidence, including several recordings. The transcript of trial proceedings runs to about 7,500 pages.

"Frequently during the course of every trial session multiple objections were presented by counsel for each defendant and often objections were accompanied or followed by motions for mistrial. Voluble and vigorous objections and exceptions were made to nearly every procedure and incident of the trial. Largely at the instance of defendants' counsel, perhaps unavoidably, the evidence contains much repetition and extended inquiry into the details of transactions and events of only incidental relationship to the offenses charged. Defendants' counsel were allowed a wide latitude in cross-examination of witnesses called both by the government and by co-defendants, and the privilege was fully exercised.

"Oral and written motions for acquittal and for new trial presenting numerous and extended contentions were submitted by each defendant. Judge Tolin died

June 11, 1961, and on June 26, 1961 the undersigned was designated as successor judge pursuant to Rule 25. Each of the defendants filed supplemental motions for new trial raising the contention that a successor judge could not properly discharge judicial duties in the case. After extensive consideration thereof the supplemental motions were denied by an order dated October 13, 1961. At the time of entry of that order a 2,000 page rough draft of the abstract referred to in the order was completed. Further condensing and typing of the abstract in final form for filing has been unavoidably delayed but will be completed shortly.

“Examination of the voluminous record with relation to each of the numerous questions presented has required a great amount of time, study and effort. Even brief discussion of all of the contentions advanced by defendants would require an extremely lengthy memorandum. Full discussion of any of the contentions would necessarily require extended statement. The value, if any, of such dissertation by this court does not seem to warrant the time and effort involved in its preparation, or to justify further delay in decision. Three of the defendants are in custody and early disposition of all pending matters is important to all concerned. The abstract of record to be filed as an appendix to this order and that of October 13, 1961 has greatly facilitated close and careful scrutiny of each and every point raised by each defendant. Each asserted error has been fully considered and checked against the record in the light of the pertinent authorities.

“On the whole record this court is fully satisfied every defendant was accorded a fair trial, free from

prejudicial error, and that the evidence thoroughly supports the verdict in every essential particular as to each defendant. The contentions of defendants which entailed the most exhaustive consideration of the record and analysis of authority are those relating to the credibility of government witnesses, the admission in evidence of the recordings and their playing to the jury. The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesselthorpe or both. Their testimony, in all essential particulars was fully and convincingly corroborated. Nor is there any doubt as to the admissibility of the recordings and of the propriety of their being played under the circumstances shown by the record. This court is now fully satisfied there is no substantial merit in the contentions referred to which would support a finding of prejudicial error. However, if counsel for the government or for any defendant desire to offer any further argument or statement, oral or written, on the contentions specified, such may be submitted at or before a hearing in open court which is hereby set for Saturday, December 2, 1961, commencing at 10:00 a.m.

“All defendants and their counsel are hereby directed to be present at the time stated. Sentences will be imposed at that time in the event defendants’ motions are finally denied at that hearing.

“Dated this 28th day of November, 1961.

George H. Boldt,
United States District Judge”

[VI C.T. 1446-1448.]

APPENDIX E.

The Portions of Judge Tolin's Charge to the Jury Concerning Reputation Evidence.

"There is another thing which is just a little bit out of the perfectly reasoned symmetry of the law, a rule regarding reputation. You will recall that reputation and character are very different. Character is what a person is. Many times people with fine traits of character go through life without those fine traits being fully displayed to others because of the difficulty of communication, or sometimes timidity, sometimes one thing or other.

"But reputation is what does the community think of a person. Now, reputation evidence has great value in certain types of cases. Suppose that some one of the great outstanding characters of the business, political or educational, clerical field were discovered in an incriminating situation or what appeared to casual observation to be an incriminating situation. Suppose that some excited victim of a robbery said, 'Yes, that is him. That is him,' and found out it wasn't. Suppose that this person were exceedingly substantial. Let's take, just for illustration, a person to whom this would be most unlikely to happen, say, the Governor of New York. While a governor was apprehended one time near the scene of a robbery and was accused of it, it would be very, very unlikely that a person of the reputation of that man would be out as a stick-up man.

"Once you have a principle in law it applies to everyone, and this is not to say that it should not be applied in this case or that it should not be applied very carefully

and sympathetically in this case. But evidence of the reputation of a witness should be examined very carefully, bearing in mind that it is reputation.

“In this case the reputation as to Mr. Leonard as a witness is somewhat conflicting. You should look to see to what extent he is corroborated by other circumstances, and if you are going to make any determination as to what his reputation is or has been consider all of the evidence on the point.

“Now, as to defendants as defendants, not as witnesses, a defendant may become a witness or not as he chooses. But as defendants, the reputation of a defendant can only be put in evidence if that defendant elects to put it in evidence. He exercises the election by calling a witness who testifies to his good reputation.

“In this case we have the conflict of problems that arises from that in the case of Defendant Gibson. As I recall it, the defendant Gibson was the only one who put his reputation in evidence. He called witnesses and they were asked questions, ‘Is his reputation good or bad?’ And they said it was good.

“That is offered as to someone under the same principle I mentioned regarding the Governor of New York. Mr. Gibson, of course, doesn’t claim to be a governor of any political subdivision. He claims to be an active managing head of substantial commercial interests. He claims to be a member of the bar, and he claims to have a good reputation. This is not to say that people of good reputation are entitled to go and commit crimes. No one is entitled to commit crimes. But there might be instances, as in that possibly now

getting about to the limit of its usefulness in instructions, that case we mentioned as to the Governor of New York being charged with robbery.

“The jury is entitled to consider whether a person having such a reputation would commit such an offense. It is all up to you and you are to integrate all of this evidence. You are to integrate all of these instructions. Take nothing as an isolated matter. Consider the picture as a whole.

“No other evidence of what the reputation of a defendant in this case is has been put before you. Formulas of the law would not permit it, except in this one instance, and then it was somewhat fragmentary, as I will point out to you.

“The witness Leonard said that he understood that certain persons had underworld reputations. The Indictment charges that the conspirators would use persons of underworld reputations in order to frighten Leonard, and it becomes important to know whether Leonard so considered people who were, as he put it, undertaking to frighten him.

“Now, you will have to consider whether it was the intent of the defendants, and if so, has it been evidenced here by either circumstantial or direct evidence, to use people with that type of a reputation.

“You will have to consider whether Leonard or Neseth were people who would be apt to be influenced by people of such a reputation. Influenced, and if so, in what way? Then you will have to consider was he so influenced.

“But so far as the reputation of any defendant is concerned, the only evidence here on what the reputa-

tion actually was of any defendant is that Gibson has offered evidence that his reputation was good. Insofar as I can recall, strictly in the field of reputation evidence, that is, someone getting on the stand and saying, 'I know what his reputation is', there was no evidence to the contrary.

"But bear in mind that reputation evidence does have a very limited purpose in the trial." [50 R.T. p. 7695, line 23, to p. 7699, line 15.]

"Mr. Bradley: On behalf of Dragna, the court please, first of all, I think the comment you made in regard to reputation has not pointed out to the jury that the testimony of Leonard in regard to the alleged reputation of Dragna was admitted solely for the purpose of showing his state of mind. I think this results partially—

"The Court: All right. That is enough.

"(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

"The Court: The evidence of Leonard regarding the reputation of certain defendants was admitted into evidence and shall be considered by you only as showing or as evidence upon the subject of what Leonard's state of mind was concerning those defendants.

"There has been no independent testimony regarding the reputations of those defendants. Reputation, as you know, is what the community thinks a person is. What the character of those defendants might be you may assess from all of the evidence in the case which might bear upon that subject.

“(Whereupon, the following proceedings were had at the bench, out of the hearing of the jury, with all counsel and defendants present:)

“Mr. Goldstein: During the course of your main charge and this time, as well, you referred to Leonard’s testimony. Nesseth also testified with regard to his understanding of his reputation.

“(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

“The Court: That comment applies also to Mr. Nesseth.” [50 R.T. p. 7705, line 18, to p. 7708, line 3.]

APPENDIX F.

Judge Tolin's Instructions (During the Presentation of Evidence and in His Charge to the Jury Before They Retired to Deliberate) Concerning Proof of Membership in a Conspiracy and Declarations by Co-Conspirators.

"I will tell the jury that, of course, when any one of a group of conspirators makes a statement in furtherance of the purpose of the conspiracy, that is binding on all the co-conspirators. But that rule only applies if there are co-conspirators.

"Now, before you can hold any one of these defendants to be bound by this conversation with Mr. Palermo, if you believe there was such a conversation, it would be necessary for you to find from other evidence that such person, as to whom you are making applicable that conversation, was in fact a conspirator." [12 R.T. 1664, line 20 to 1665, line 5.]

"The Court: Members of the jury:

"It has been agreed that this recording is to be played with the major obscenities edited out. Now, I should tell you that none of these defendants now before the court said any of the obscene words, or it is not plain that they did, and they weren't even there. That perhaps brings to you the question of why do we hear it? In the indictment in this case, it is charged that although Daly was a co-conspirator, that is, a person that could have been indicted along with the rest but for some reason wasn't, and under the law, if he really was a co-conspirator, but not otherwise, any statements that he made or acts that he did

which were contemplated by him to be in aid of accomplishing the purpose of the conspiracy are binding upon any other person or persons who were at that time conspirators. In other words, if you have a conspiracy, you have two or more persons who are undertaking to accomplish some criminal purpose by joint action, and if Mr. Daly was one of those persons, then you are entitled to know what he did, what he said toward attempting to effectuate the purpose of the conspiracy. Now, it is a contention that he was a member of the conspiracy and it is a contention that each of these defendants was a member of the conspiracy, but, each defendant still remains a case to himself, you have to judge each one personally and you have to determine whether Mr. Daly was a member of the conspiracy. That you can't do until you get to the deliberations in the jury room.

“But, on the basis that there has been some evidence which might be interpreted to the effect that Daly was a conspirator and some evidence which might be interpreted that one or more of these defendants on trial was a conspirator and evidence which might be interpreted that Daly was acting on behalf of the conspirators as a group, it makes the playing of this record a proper thing to do in the case.

“Now, I think there is another thing you should bear in mind as you hear the recording. I don't know just how it would shape up on analysis, because you are the ones who are to analyze, because you are the only ones who are to judge the evidence, but, bear in mind as you consider this recording that one party to it, that is, Mr. Leonard knew it was

being recorded; the other party to it, Mr. Daly, didn't. Mr. Leonard went to the conversation having been equipped, according to the evidence here, with the device by which the recording was made, but it was secreted upon his person, so the other party to the conversation, Mr. Daly, didn't know it was being recorded. You should, therefore, when you consider this, bear in mind that that situation existed and the various inferences which can be drawn from it will be pointed out to you when the case is argued. I am sorry, but we have a long way to go in this case yet." [17 R.T. 2510, line 22 to 2512, line 21.]

". . . It is a rule of the law of conspiracy that whenever any one of the conspirators does an act, has a conversation or takes some action for the purpose of furthering the objectives of the conspiracy, that it is the act of all; just as in a partnership, it is the act of all. Now, it is an issue in the case: Was there a conspiracy? I am not saying that it has been proved that there was. That is for the jury to say when they get the case, after all the evidence is in, but at this stage of the trial, under the rules that I have announced, this question is proper and should be answered. So the objection is overruled." [37 R.T. 5508, line 4 to line 15.]

"The Court: Now, members of the jury, there have been objections to some of this on behalf of some of the defendants other than Palermo, and I refer to these questions about conversations with Captain Hamilton. You should bear in mind that if there be a conspiracy and it be proved, that whatever one con-

spirator says, in order for it to be held against any other conspirator, must have been spoken or the act done for the purpose of aiding in the conspiracy, and if it was said or spoken for any other purpose it is not evidence against anyone except the person who said it.” [42 R.T. 6218, line 6 to line 15.]

“Early in the trial I read to you for your general orientation the instructions on conspiracy that used to be given by Judge James. Judge James wrote a lot of suggested instructions, or instructions which had been useful to him in his law career on this bench, and they were finally printed up because he is one of the old patriarchs of this court. He has been dead now some twenty years, but the law that he expounded in his instructions is considered definitive. So I took his general instructions on conspiracy and read them to you. I will read them to you again now.

“Everything I have said about the law of conspiracy is, of course, to be integrated with these instructions. In fact, juries should be told, and I do now tell you, you do not single out any particular instruction and take it out of context. The instructions are to be considered in their entirety. Consider the whole thing.

“Now to Judge James’ instructions on conspiracy:

“The law under which the indictment in this case is drawn provides that if two or more persons conspire to commit any offense against the United States, and one or more of them does any act to effect the object of the conspiracy, each of the parties to such conspiracy is guilty.’” [50 R.T. 7650, line 23 to 7651, line 20.]

“Now I am coming back to Judge James:

‘In order to establish the crime charged, it is necessary, first, that the conspiracy or agreement to commit the particular offense against the United States as alleged in the indictment be established, and secondly, to prove further that one or more of the parties engaging in the conspiracy has committed some act to effect the object thereof.

‘To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlawful venture or scheme, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before the defendants may be found guilty of the charge it must appear beyond a reasonable doubt that a conspiracy was formed as alleged in the in-

dictment, and that the defendants were active parties thereto.

‘In order to warrant you in finding a verdict of guilty against the defendants, or any of them, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in the indictment was entered into between two or more of the defendants to violate the law of the United States in the manner described in the indictment. It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid.

‘Under the charge made the conspiracy constitutes the offense and it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such. The mere fact that either or any of the defendants named may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendant or defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged is made out.

‘Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

‘Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by

any of the conspirators may be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.

‘The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants or either of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you should make the deduction and find accordingly.

‘It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if any of the defendants, with knowledge that it was the design that the law be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, they would be guilty.’

“Judge James wrote those instructions back in the days when the juries in this court were all male, so I referred to ‘reasonable men’, and so on. But, of course, it could have been transposed to read ‘reasonable jurors’, because our jury today is principally female.” [50 R.T. 7652, line 16 to 7657, line 23. A portion of Judge James’ form instructions on the law of conspiracy were first read to the jury during appellee’s case-in-chief: 11 R.T. 1627-1630.]

* * * * *

“However, that does bring to mind I overlooked giving verbatim two of Mr. Ming’s I told him I would give.

“Mr. Ming: I was about to call attention to that.

“The Court: You stay here. I am going over by the microphone. My voice is kind of tired. We have had almost two hours of this.

“(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

“The Court: I overlooked a few, but they are not particularly extended.

‘The question of the guilt or innocence of any defendant must be determined from the evidence which relates to him and must not be controlled or affected by testimony which relates only to other defendants.’

“Now, in this regard you will recall that there is a principle that if a conspiracy actually exists, after it has come into being, that anything said by any one of the co-conspirators, if said for the purpose of furthering the conspiracy, is evidence against all.

“That, of course, I reaffirm, but I do not mean to re-emphasize it, but when I gave it to you before this morning I omitted by inadvertence the other statement given today, and to put it in context I repeat it.

‘You are instructed that in considering the guilt or innocence of the defendant Gibson you may not consider the words or conduct of any other defendant not in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy.’

“You probably realize, and you are now told Mr. Gibson is a defendant in only the conspiracy counts.”
[50 R.T. 7713, line 15 to 7715, line 5.]

* * * * *

“(Whereupon, from 12:02 o’clock p.m. to 12:03 o’clock p.m., the following proceedings were had at the bench, out of the hearing of the jury, with all counsel and defendants present:)

“Mr. Bradley: If the court please, I would like to advise the court that the same situation pertains in regard to Mr. Dragna as it does with regard to Mr. Gibson. Mr. Dragna is accused in only Count One and Count Five. You have now left the impression that only Mr. Gibson is involved in those two counts.

“The Court: No, I don’t think I left that.

“Mr. Strong: The same as to Palermo.

“The Court: If you think so, I will clarify it.

“(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

“The Court: The defendant Dragna is also concerned in only Counts One and Five.

“(Whereupon, from 12:05 o’clock p.m. to 12:08 o’clock p.m., the following proceedings were had at the bench, out of the hearing of the jury, with all counsel and defendants present:)

“Mr. Strong: In giving the instruction with relation to Mr. Gibson and using his name, actually they apply also to the defendant Palermo.

“Mr. Beirne: All of the defendants. The declarations of the acts of a co-conspirator can’t be used to establish a conspiracy. It must be proved by independent evidence. Membership in a conspiracy cannot be proved by declaractions, [sic] that must be proved by independent evidence.

“The Court: I think it is covered adequately by the James instructions.

“Mr. Beirne: I don’t think your Honor mentioned it. I may be mistaken.

“The Court: What about it, Mr. Goldstein?

“Mr. Goldstein: I think you gave a full instruction on that subject.

“The Court: I think it was quite adequate, and it has been worked out pretty fully. Your exception is noted.” [50 R.T. 7717, line 1 to 7719, line 21.]

* * * * *

“The Court: Whenever during the trial I advised that certain evidence was limited to a certain purpose or party, bear in mind that it shall be so limited.” [50 R.T. 7728, lines 3-5.]

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REPLY BRIEF OF APPELLANT GIBSON

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REPLY BRIEF OF APPELLANT GIBSON

I.

THE EVIDENCE IS INSUFFICIENT AS TO APPELLANT GIBSON
(Reply to Appellee's Point VI, B 3(c), Pages 222-228).

The prosecution must concede that to sustain the verdict against Mr. Gibson there must be evidence of acts or statements and declarations by Mr. Gibson himself sufficient to prove beyond a reasonable doubt that he was a party to the conspiracies charged. Innuendoes, evidence concerning others, and argument will not support the verdict, no matter how much they may have prejudiced the jury. Only evidence as to Mr. Gibson's conduct will suffice. Moreover, if any rational inference other than that of guilt can be

drawn from the evidence of Gibson's conduct, the verdict cannot stand.

The prosecution is well aware of these elementary principles. So, in an effort to meet appellant's contention that the evidence adduced at the trial did not support the verdict as to Mr. Gibson on any theory, the prosecution has summarized the evidence with respect to Mr. Gibson at pages 222-228 of appellee's brief.

Primarily, the prosecution relies upon the uncorroborated testimony of Leonard and Nesseth that Gibson told Leonard and Nesseth to pretend to "go along" with the alleged demand for a share of Jordan's purses. When Nesseth objected, according to him and Leonard, Gibson told them it would not cost them anything because he, Gibson, would pay any money demanded. Thus, the testimony of the prosecution's principal witnesses is wholly inconsistent with the charge that Gibson was a party to any conspiracy to extort money from Leonard and Nesseth. What those witnesses claimed was that Gibson undertook to keep them harmless from any demands which might be made on them!

The prosecution would have this Court ignore the testimony of Leonard, Nesseth, McCoy and Gibson that Mr. Gibson emphatically negated any possibility of violence. Even more important, the prosecution would have this Court ignore Mr. Gibson's uncontradicted testimony that he told Leonard and Nesseth that Jordan could have a title fight with Akins if they wanted it and that it was entirely up to them.

Seeking to corroborate Leonard's testimony that his promises to Palermo were made at Gibson's instigation, Leonard testified that he called Palermo on October 23, 1958, from a public telephone in the lobby of the Ambassador Hotel where Gibson was then staying. This call, according to Leonard, was made immediately after Gibson had met with Leonard, Nesseth and McCoy to discuss a championship fight for Jordan. The prosecution would like to ignore the fact that the only telephone call it proved from Leonard to Palermo was in fact made from a drug-store after Gibson had left Los Angeles. In addition, the testimony was uncontradicted that Gibson met with Leonard, Parnassus and others to discuss the formation of the Hollywood Boxing and Wrestling Club on the evening of October 23, 1958, and not even Leonard claimed that there was any reference to Palermo or Jordan in these conversations.

Contrary to the prosecution's statements, there never was any testimony that it was important to Gibson that an Akins-Jordan fight be held. On the contrary Mr. Gibson testified, without contradiction, that there were contenders other than Jordan available to fight Akins for the title and there were other championship fights which could have been scheduled for December 5, 1958, the date proposed for the Jordan-Akins fight, and the date on which it was held.

Thus the prosecution's principal evidence with respect to Mr. Gibson does not show that he was a party to a conspiracy and part of the prosecution's evidence is inconsistent with the facts as shown by the prosecu-

tion. The plain fact is that the prosecution failed to show that Gibson was a party to any conspiracy as the indictment charged. The testimony of Leonard and Nesseth does not warrant the inference that even they were so claiming. On the contrary their testimony is inconsistent with an inference that he was a party to a conspiracy to extort by violence when even the prosecution witnesses testified that Gibson asserted to them that violence "went out with high button shoes".

Apart from the Leonard-Nesseth testimony the prosecution relies upon four "examples of Gibson's flagrant conduct revealing the true nature of his associations with his co-conspirators and his consciousness of guilt with respect to this relationship" (Appellee's Brief, Page 224).

The first of these is the payment by Nevill Advertising Agency to Viola Masters who was identified as the wife of John Paul Carbo. The evidence is uncontradicted that it was the decision of Mr. Norris to make these payments and they were made at his direction. Mr. Gibson was neither an officer of nor a stockholder of Nevill Advertising Agency. In this and in other corporate matters Mr. Gibson carried out, as he was legally obligated to do, the policies of the boards of directors to which he was responsible and his superior corporate officers. This cannot be said to be conduct of Mr. Gibson. In any event these payments terminated in 1957 long prior to the matter here involved.

The prosecution next points to a payment of \$1,800.00 to Jackie Leonard by the Chicago Stadium Corpora-

tion at Mr. Gibson's direction. The prosecution labels as false the description of this payment on the books of that corporation as an advance on a Porterville promotion. As is so frequently the situation in this case the prosecution adduces no evidence to contradict the books and records and relies simply on an assertion of falsity. Such assertions are not evidence. Leonard admitted that he was endeavoring to arrange a promotion in Porterville. Mr. Malitz testified in detail about the matter. The payment of \$1,800.00 was not made with funds of Mr. Gibson. Though it was made at his direction, the payment was in fact made by an Illinois corporation in which Mr. Gibson had no interest. Advances to promoters, fighters and managers were an integral part of this business. Thus there can be no inference of impropriety from this one. Ironically, Nesselth demanded, got and lied about another advance. It seems inconceivable that the Porterville advance warrants any inference. What Leonard did with the money cannot affect Gibson. As the evidence shows the IBC never sought to control or question what advances were used for. This was wholly a matter for the promoter or fighter to whom the advance was made.

The next item on which the prosecution relies is the payment by two checks totaling \$9,000.00 to Frank Palermo on May 15, 1959, by Title Promotions, Inc. Of these the prosecution insists that the bookkeeping entries are "palpably false" and "Gibson's explanations are incredible." There is no evidence to contradict the defense showing that these payments were

made to Palermo in the ordinary course of promotion of boxing matches and had nothing to do with the matter alleged involved in this case. Palermo was in the boxing business and had been for many years. Payments by promoters, then, to him were not patently illegal. Gibson testified that one check for \$4,000.00 was to reimburse Palermo for expenditures he had made for the benefit of Johnny Saxton who was ill. Saxton had been a world's champion who had fought under Palermo's management and had appeared in numerous IBC sponsored bouts.

Gibson also testified that the other \$5,000.00 was paid for Palermo's services in keeping Sonny Liston willing to fight for Gibson. Is it incredible that businessmen would help an unfortunate fighter? Certainly Gibson's interest in Liston was publicly demonstrated not to be "incredible" when Liston won the heavyweight championship.

Finally, the prosecution points to a letter from Mr. Gibson to George Parnassus dated October 28, 1958, in which Mr. Gibson outlined his views of the way the Hollywood Boxing and Wrestling Club should be set up. It is uncontradicted that the Hollywood Boxing and Wrestling Club was not in fact set up in accordance with the outline of that letter. That letter really shows that Gibson had no control at all over Leonard or that club. What is more, careful review of the indictment, the evidence in this case and the prosecution's arguments all combine to show that the advances by the IBC and the efforts of Mr. Gibson in connection with the Hollywood Boxing and Wrestling

Club paralleled in time the matters involved in this case but had no relationship to them. Indeed, it is only the unfortunate coincidence in time and Mr. Gibson's efforts to finance Leonard's ill-fated attempt to promote boxing in the Legion Stadium that created an opportunity for the prosecution to seek to snare Mr. Gibson in their conspiracy dragnet.

Put all together, of the four "examples of Gibson's flagrant conduct" relied upon by the prosecution one was the conduct of some one other than Mr. Gibson which occurred long before the matter in question. Two are "flagrant conduct" only if the prosecution's unsworn statement is accepted rather than Mr. Gibson's testimony under oath corroborated by corporate records kept in ordinary course. The fourth is simply a suggestion of a lawful business arrangement which in fact was not carried out. If the word "flagrant" is to be used in connection with these matters it is best used to describe the lack of evidence upon which to support the conviction of Mr. Gibson.

Keenly aware of that lack of evidence the prosecution (Appellee's Brief, Pages 225-226) seeks to find "admissions" by Mr. Gibson in his testimony to support the conviction. They are no more successful in that than they were in producing proof.

We have already commented, and it will not be repeated here, on the impropriety of the questions with respect to the "underworld". But strain as they may the prosecution cannot make even that improper questioning amount to an admission of guilt of the conspiracy with which Mr. Gibson is charged here.

Both the questions and the answers are so vague and general as not to warrant any specific inference other than that IBC did not refuse to employ people because they might have had criminal records. There is no evidence that they used any persons because they had criminal records.

The Government points to the fact that Mr. Gibson testified that he had a telephone conversation with Palermo on April 29, 1959, the day before Palermo flew from Pennsylvania to Chicago, and then on to Los Angeles. The prosecution completely ignores the fact that the only evidence as to the subject matter of that conversation is the uncontradicted testimony of Mr. Gibson that it concerned Palermo's efforts to arrange a Hart-Jordan fight in Pittsburgh. The prosecution misstates an alleged admission: Palermo and Gibson were not "working towards the same objective: a Hart-Jordan fight". Gibson was endeavoring to promote a Hart-Jordan fight for Los Angeles for the benefit of Leonard's boxing club. Palermo was trying to arrange a Hart-Jordan fight in Pittsburgh under different promotional auspices. These facts are uncontradicted in the record. They are not "admissions" of anything.

That Mr. Gibson told Palermo to get out of Los Angeles in May, 1959, is no more of an "admission" than that Gibson told Leonard and Nesseth at about the same time that if they feared violence they should "run, not walk, to the nearest law enforcement officers". It can hardly be called an "admission" when a lawyer recommends recourse to law enforcement

officers or advises against urging demands which are denied.

Finally, the prosecution calls it an "admission" that Mr. Gibson was "neither concerned nor indignant" when Palermo told him that he had a share of Jordan's contract. This scraping of the barrel for inferences demonstrates the bankruptcy of the prosecution's case. Even more important this was not an admission of anything and the prosecution carefully refrains from describing what is admitted. Certainly lack of concern or lack of indignation does not satisfy the requirements of the federal law as to what is necessary to show criminal intent.

Even more preposterous are the prosecution's references as admissions to Carbo's congratulations to Gibson when he was elected president of IBC; Carbo's inquiry of Gibson about Leonard's testimony after the State Athletic Commission hearing, and a casual conversation between Carbo and Gibson in 1957. None of these things was illegal and none shows a guilty intent.

Finally, ignoring the sheaf of uncontradicted testimony about Gibson's concern about the insolvency of the Hollywood Boxing and Wrestling Club which owed the Company he represented \$26,000.00 and owed \$10,000 to an individual whom Gibson had persuaded to make a loan to Leonard, the prosecution points to Gibson's arrangement with Daly to go to Los Angeles to investigate the crisis at the Legion Stadium. In some respect this is the most farfetched of the prosecution's claims. The evidence shows with-

out contradiction, that what Mr. Gibson was doing was endeavoring to protect his lawful business interest and sought the aid of an individual who on the basis of long experience and contacts might have been helpful in saving the Hollywood Boxing and Wrestling Club. If this is an “admission” it is certainly only an admission that Gibson was protecting to the best of his ability business matters for which he was responsible.

Sometimes skillfully and sometimes relying upon distortions or misstatements of the evidence the prosecution seeks to explain the conviction of Mr. Gibson. But an explanation is not sufficient to support a conviction. A conviction must be supported by evidence which shows beyond a reasonable doubt that a defendant is guilty of the offense charged. In this case every reasonable inference of Mr. Gibson’s conduct leads to a conclusion of his innocence, not his guilt. Thus, we respectfully submit, the evidence is insufficient to support his conviction.

II.

THE APPELLEE HAS NOT MET THE CHARGE THAT MR. GIBSON WAS DENIED A FAIR TRIAL.

A. Pretrial Conduct of the Prosecution.

To meet the charge that the pretrial conduct of the prosecution was improper, the prosecution relies upon allegations about “false hopes and forged documents” (see Appellee’s Brief, Pages 298-299). None of the documents referred to is a part of this record. Neither Mr. Gibson nor his counsel has ever relied upon them.

If there is a question of good faith involved in this connection we respectfully suggest that the good faith of prosecution which goes outside the record must be seriously questioned. Appellee may now "welcome a judicial inquiry into the conduct of all counsel in this matter" but it resisted the effort of Mr. Gibson's counsel on February 20, 1960, prior to the trial to introduce evidence concerning this whole matter.

B. Conduct of the Prosecution During Closing Argument.

Appellee furnishes no record reference to any discussion by counsel for Mr. Gibson of Exhibits Z-36 and Z-37. Appellant's counsel contended on the trial, and contends now, that introduction of new matter by the prosecution on rebuttal was improper. Were it not so serious, it would be ludicrous for the prosecution to accuse counsel for the defense with improper conduct when it was a prosecutor who physically threatened defense counsel.

C. Prosecution's Use of False Testimony.

The prosecution told the jury on opening argument that Leonard had made inconsistent statements. This alone would be sufficient to warrant the charge that the prosecution had relied upon evidence which it knew was false and misleading. Significantly the appellee's brief refers to no proof to the contrary.

D. The Instructions.

Though the appellee argues at length to justify the instructions it nowhere justifies the instruction as to agency given by Judge Tolin after the jury had re-

turned (see Appellant Gibson's Opening Brief, Page 55).

E. Disposition by the Successor Judge.

Appellee seeks to justify disposition of this matter by a successor judge. Nowhere does appellee attempt to justify disposition of a case wholly dependent upon the credibility of witnesses by a judge who did not hear those witnesses. This is particularly important in this case where the prosecution relied principally upon two witnesses, Leonard and Nesselth, and where four of the five defendants, including Mr. Gibson, testified at length. There is a sharp conflict in the testimony particularly as to certain points between the testimony of Mr. Gibson and Leonard and Nesselth and we repeat, as we asserted in the opening brief, that the prosecution made no effort to rebut Mr. Gibson's testimony by either Mr. Leonard or Mr. Nesselth and the record shows this to be the case.

Under all these circumstances we respectfully submit that Mr. Gibson, for this reason, among others, was denied a fair trial.

III.

CONCLUSION

Within the limitations fixed by the Rules of this Court, and despite the enormity of the record here, we have sought to point out to the Court matters which we respectfully submit require setting aside the conviction of Mr. Gibson. Accordingly, we pray that this Court will do so.

Dated, October 5, 1962.

Respectfully submitted,

LOREN MILLER

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Attorneys for Appellant Gibson.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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vs.

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Appellee.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT
PAUL JOHN CARBO

I.

COMMENT ON APPELLEE'S STATEMENT OF
FACTS AND INTRODUCTION TO STATEMENT
OF FACTS (Appellee's Br. pp. 9-126)

With appellee's efforts in setting out the facts having resulted in as long a presentation as it has, we think it would be of little help to the Court to dissect that Statement and dwell upon the many errors and incorrect nuances contained therein. We feel it proper, however, to point out a few.

At appellee's brief, page 12, it says:

"It was conclusively proven that Gibson used Carbo and Palermo in the operation of his business

and, conversely, it was shown that Carbo and Palermo used the I. B. C. in their extortive capacity.

[34 RT 5050; 35 RT 5127, 5130 - 5136, 5138.]"

(Emphasis appellee's).

The transcript references are to Gibson's testimony as to the use of the term "underworld" in his appearance before the Kefauver Committee. There is no testimony therein either that Gibson used Palermo and Carbo in his business or that Carbo and/or Palermo used Gibson and/or the IBC in their extortive capacity or any other capacity or at all.

Moreover, its use by appellee against Carbo of this testimony of Gibson demonstrates the unfairness of the whole line of testimony having been admitted into evidence at all. Although the court instructed that this testimony was to be considered only against Gibson (RT 2692-3, 5050, 5130), the prosecution, through skilled counsel, trained to make distinctions and to consider evidence for the purposes and according to the limitations under which it is admitted, nevertheless uses this evidence in direct disregard of the court's instruction and uses it against Carbo, and the other defendants as well. This is a graphic demonstration, we believe, of appellee's whole approach to the case.

At appellee's brief, page 11, appellee distorts the meaning of defendant Palermo's statement on the witness stand (RT 5985) that, "We have been doing this for years. This is the first time this kind of a case ever came about."

What Palermo was referring to was his services in

obtaining a match with the champion in consideration of receiving from the manager of the challenger a portion of the manager's end of the purse. He was not referring to extortion, but to Leonard's promise to pay him for services rendered.

At page 11 of its brief, appellee, purporting to be making a statement of fact, says:

"The other appellants, particularly Carbo and Palermo, were furtive and sinister in the day to day conduct of their business affairs. They were without roots in any community in this country and employed crude methods in the acquisition of money and economic power in boxing."

This is pure argument, not a statement of fact, and appellee cites nothing to support it.

At page 16 of its brief, in the paragraph beginning with the words "In the effort" and the following paragraph, appellee makes reference to the transaction in which Viola Masters (Mrs. Carbo) was paid \$40,000.00 by the Neville Advertising Agency. All of the testimony regarding this transaction was limited to the defendant Gibson, and the court instructed the jury that it could not be considered as against Carbo nor any of the other defendants (18 RT 2692-3). Nevertheless, as elsewhere, appellee improperly does that very thing. The statement (Appellee's Br. p. 16) that "Consequently, Carbo was paid until 1957 ..." is without foundation; as is the statement (ibid) that "Approximately \$40,000 was paid to Carbo in this fashion" contained in the second paragraph. Nor is

there any basis for the statement (Br. p. 17) "that Gibson knew the payments were made for the benefit of Carbo is uncontroverted" The statement (Br. p. 17) that Gibson "caused" the payments to be made implies that he had something to do with authorizing them. The fact is that he testified he caused them to be made "in the sense of getting a check and sending it out" (32 RT 4772).

With reference to the \$10,000 loan from Glickman to Carbo (Appellee's Br. p. 17), and the statement that it had been tendered in cash and no evidence of the debt received therefor, the prosecution did not call attention to the fact that the \$10,000 loan was repaid by Carbo (29 RT 4283).

In connection with a phone call to one Viscusi, appellee makes the statement (Br. pp. 20-21) that Palermo said he had been told by the person on the other end that the latter did not have any money. The witness testifying was stating his conclusion as to what the other person said, viz., "I don't have it right now" (43 RT 6521). Nor does the prosecution add that after this conversation about "Looking in the drawers," the group laughed (ibid).

Appellee's statement (Br. p. 21) that at the Goldie Ahern party Carbo had talked to Glickman, Akins' manager, and said that a particular fighter was his, Carbo's, "and that Palermo should not worry about it" is not true. The record shows that the witness testified Carbo "was speaking to the group in general" when he made that statement -- and not to Palermo (43 RT 6525).

On Page 37 of Appellee's Brief it is stated that as a result of Glickman's threat to renege on his forty per cent of gross

contract, I. B. C. paid Glickman in excess of the contract filed with the California State Athletic Commission. Gibson did testify that they paid some \$13,000 more than called for in the Commission form contract, but added "We consider our obligations to go much beyond what was down on a piece of paper." (33 RT 4857).

Appellee states (Br. p. 38): "Gibson told Leonard that Carbo's and Palermo's share of Jordan's purse would not be due until he won the rematch. [5 R.T. 619, 628]" (Emphasis added).

The transcript references make no mention of Carbo.

On pages 64 to 68 of Appellee's Brief, the purported telephone calls of April 28th from Carbo and Palermo to Leonard are discussed. Other than the bare statement that Nesseseth left New York on April 27th and arrived in Los Angeles on the 28th and went to the Hollywood Legion Stadium, the prosecution has not set forth the actual facts concerning the testimony of both Nesseseth and Chargin concerning that trip and its relation to the time when Nesseseth arrived in Los Angeles and whether he could have been in Leonard's office at all when the calls were made. Under Point IX in our opening brief (Carbo Op. Br. pp. 74-77) in dealing with Count IX, we have discussed this matter fully and in detail, and there the Court will find references to the transcript not supplied by appellee and which portion of the transcript discloses the actual facts concerning this transaction.

Moreover, in this connection, appellee does not point out that the difference in time between Philadelphia and Los Angeles at the time of these purported telephone calls was three hours, so

that the calls would have been received here three hours earlier on the clock than the time they would have been placed in Philadelphia. Nor does the prosecution tell the Court in its Statement of Facts that the toll slips purporting to represent those calls (Exs. 21 and 22) do not indicate whether they were in the A. M. or P. M. , and there was no showing on that subject adduced by the prosecution. However, the Court will note that despite those facts, the prosecution in its Appendix A, purporting to be a list of the telephone calls in evidence, has listed these calls as having been made in the P. M. (see calls Nos. 16 and 17, Govt's Appendix A).

On page 68 of its brief, appellee says that Carbo's presence in Philadelphia was "further confirmed" by the witness De John who saw Carbo and Palermo in a private residence in April or May, 1959.

Since this statement follows immediately the discussion of the telephone calls purportedly made by Carbo and Palermo, it is obvious that the statement "Carbo's presence in Philadelphia" was intended to have this Court believe that that "presence" was on April 28, 1959, and that that was "confirmed" by the testimony of De John. This is just another instance of the Appellee's use of a statement of argument as a substitute for a statement of facts. Nor is the argument sound, since De John testified that he "was not very sure if it was April or May" when he saw Carbo in Philadelphia, and there was no showing that he saw Carbo there on April 28th (RT 6577).

On page 122 of Appellee's Brief, reference is made to a

'phone call to Gibson from Carbo in which Gibson told Carbo that Leonard had testified at the hearing that Palermo had entered Leonard's office, and that Carbo had replied that Gibson must be mistaken, that Palermo had not entered Leonard's office. Significantly, the Government has omitted the balance of that conversation, in which Carbo said he had been reading about the hearing in the paper and that it was all a bunch of lies; also that Carbo had asked Gibson what reference had been made to him in the hearing, and Gibson told him that Leonard said he did not know him (Carbo), and that Carbo had said, "Well, that is funny. He knew me well enough to get money from me." (33 RT 4933-34). As, indeed, he had (RT 4515-16, 5163-66).

The innocuous treatment by appellee (Br. pp. 125-126) of its witness Leonard's attempt to extort \$25,000 from Palermo in return for Leonard's not testifying, is dealt with below in Point VI, B.

* * *

We turn now to some of the legal questions in the case.

II.

THE SUPPLEMENTAL MOTIONS FOR NEW TRIAL UNDER RULE 25 SHOULD HAVE BEEN GRANTED (Reply to Appellee's Point VI, D, pp. 329-339).

Appellee has failed to come to grips with appellant's argument.

Appellant does not contend, as suggested by appellee (p. 330) "that the death of the trial judge subsequent to jury verdict is . . . , in itself, sufficient ground for ordering a new trial". Nor does appellant urge, as stated by appellee (Br. p. 333) "that a lengthy case such as this should be retried after the verdict of the jury simply because another judge sitting on the same court as the trial judge with jurisdiction over the appellants must rule on post-trial motions". Nor does appellant claim, as construed by appellee (Br. p. 333) that "a successor judge cannot fulfill the duties of the trial judge". Appellant does contend that when the prosecution's case, the very heart of it, depends upon whether its witnesses are telling the truth and when there is diametric conflict thereon, 1/

1/ E. g. Did Dragna talk to Leonard on May 4, 1959 about the fighter Toluca Lopez as Dragna testified he did (RT 5627) or was nothing discussed except the dispute between Carbo, Palermo and Leonard, as appellee says (Br. pp. 84-85) Leonard testified? Or, did Carbo get on the phone on January 27, 1959, while Palermo was speaking to Leonard, and use threatening language toward the latter as Leonard said he did (RT 658), or was it the fact that Carbo was not even with Palermo on the occasion of that telephone conversation and did not talk to Leonard at all, as Palermo says was the case? (RT 5974-5). And ought not the judge whose duty it is to pass upon the credibility of witnesses, have had the opportunity to take a look at and listen to the fellow -- (Cont'd)

the successor judge, no more than an appellate court, simply is not able to decide.

Appellee does not suggest that there was no conflict in the evidence; it does not suggest that Appendix B to the Carbo brief is inaccurate, albeit appellants will agree that because of the limitations of space and time it is by no means complete. Appellee simply ignores the whole subject. But ignoring it will not and does not remove the conflict.

Nor is the study and analysis given by the successor judge "dispositive of the question" (Appellee's Br. p. 332). Because of the conflict of evidence which appellee, as we have seen, chooses to ignore, the successor judge, being only human, could study the record from now until the end of time and refine his analysis interminably and he still would be in no position to judge the credibility of the witnesses and resolve that conflict. But it is to that very process of judging the witnesses that appellants are entitled on a motion for new trial (See Carbo Op. Br. p. 52). Not even appellee disputes this. And it is this very process of judging that was denied appellants.

It begs the issue to say, as does appellee (Br. p. 333), that

1/ (Continued) the prosecution's "principal witness" (RT 7962) -- who solicited a bribe of \$25,000 from one of the defendants in exchange for not testifying (see Carbo Op. Br. Appendix B, pp. 16-19), who testified falsely about that (see Point VI, B, herein, pages 88 - 96, *infra*), and who testified before other agencies and officials so differently from the way he testified at trial (see Carbo Op. Br. Appendix B, pp. 4-5, 8-9, 10-11), before attempting to exercise the important and fundamental function required of a trial judge in a motion for new trial? We think so.

"an extremely experienced successor judge has demonstrated his understanding of the trial record and has concluded that there is no problem of credibility". Saying that black is white does not make it so. The fact is that there is conflict in the evidence on virtually every major point in the case (see Appendix B to Carbo Op.Br.) and, most respectfully, the successor judge simply could not perform the function imposed upon the trial judge, under such circumstances, in passing on the motion for new trial.

Appellee suggests (Br. p. 335) that "in the year 1962", the demeanor of the witness is of no importance in seeking to ascertain where the truth lies. This is startling doctrine. Appellee cites no authority in support. The fact is that even in 1962, the demeanor of the witness is important in judging his credibility (Cf. Guzman v. Pichirilo, 369 U.S. 698; and see this Court in 1960 [Factor v. Commissioner of Internal Revenue, 281 F.2d 100, 111, cert. den. 364 U.S. 933]). The successor judge simply was in no position to so do. Appellee's assertion becomes the more amazing in the light of its having its principal witnesses, Nesselth, Leonard and McCoy, brought into the court room and seated during the prosecution's final argument behind the prosecution's table inside the rail (RT 6805, 6810) where, "at (prosecution counsel's) request" (RT 6805), "they can be observed" "so that" the jury's "recollection would be refreshed as to ... their demeanor on the witness stand." (RT 7555).

The question now being discussed is not whether error was committed in the denial of the motions for new trial on the merits

(Appellee's Br. p. 336). 2/ (If the conflict in evidence be resolved in favor of defendants, it would be sheer arbitrariness not to grant

2/ Appellee's characterization (Br. p. 336) of some of the defense witnesses' testimony as "absurd" is worthy of little comment. For example, appellee persists (ibid) in ridiculing Glickman's testimony that he loaned \$10,000 to Carbo without a receipt. Aside from the immateriality of this testimony elicited by appellee on cross-examination (RT 4270-4271) appellee conveniently overlooks, and fails to make mention of, the fact that the loan was repaid (RT 4283).

the new trial.) The point is that defendants were entitled to have their motions for new trial passed upon by a judge who was able to fulfill the function the judge is required to fulfill on such a motion. The successor judge here was just unable to do so.

We do not understand appellee when it says (Br. p. 338):

"When defendants in a criminal case decline to waive a trial by jury, they implicitly agree that they are willing to abide by the findings of fact of the twelve persons selected to sit in the jury box." ^{3/} What manner of judicial principle is this? Appellee, of course, cites no authority. Apparently what appellee is saying, or would have the court say, is that the motion for new trial is either non-existent or, if it still be with us, it should be discarded. This is not yet the law; Rule 33, Federal Rules of Criminal Procedure, is still here; the motion for new trial is very much in being and defendants are entitled to its full measure. (Cf. Mr. Justice Frankfurter, commenting on the fact that a petition for rehearing is not a mere formality, but serves, as we say a motion for new trial does, a very important function in our judicial processes [Flynn v. United States, 99 L.Ed. 1298, 75 S.Ct. 285].)

The supplemental motion for new trial under Rule 25 should have been granted. The trial court's failure to have done so

^{3/} Appellee's citation (Br. p. 338) of a case involving the role of an appellate court on appeal demonstrates the confusion. A trial judge's role on a motion for new trial is not the same as an appellate court's role on review. On review, the appellate court does not weigh the credibility of witnesses; on a motion for new trial, the trial judge does just that (Carbo Op.Br. p. 52).

deprived appellant of a fundamental right and, therefore, deprived him of a fair trial.

III.

THE INSTRUCTIONS WERE ERRONEOUS

- A. The Jury Was Not Instructed as to the Use of Declarations of an Alleged Co-Conspirator Made Outside the Presence of a Defendant (Reply to Appellee's Point VI, C, 2, (a) pp. 307-315).
-

Appellee has not responded to nor analyzed the cases cited by appellant (Carbo Op. Br. pp. 55-57). Its discussion of this point serves only to demonstrate, we submit, the complete failure of the trial court to instruct on this vital aspect of the law of conspiracy.

In the first place, we protest the concept that an instruction on March 14, 1961 as to a single conversation by one defendant outside the presence of the other defendants, although eminently necessary at the time it was given and correct in its terms so far as it went (see Appellee's Br. p. 308, referring to a purported conversation by defendant Palermo [RT 1664-1665]), can serve as a substitute for an instruction on the whole subject of the use of the declarations of alleged co-conspirators (not merely a single defendant) as against the other non-present alleged co-conspirators, two and one-half months later (May 27, 1961) when the instructions were given to the jury before it retired to deliberate (RT 7651-

7657, 7714-7715, 7718-7719; set out in full in Carbo Op. Br. pp. 25-33).

Secondly, appellant's contention is not, as stated by appellee (Br. p. 309), "that the jury must be satisfied that a declarant or actor was a member of the conspiracy before his words or acts in furtherance of the conspiracy and during the conspiracy may be considered against the co-conspirators". 4/ That is correct law, but is a separate question. The law as to which appellants complain no instruction was given is, and of this we assert there just can be no doubt, that a declaration of an alleged co-conspirator in furtherance of the conspiracy made during the existence of the conspiracy cannot be used or considered against an alleged co-conspirator not present unless there is evidence (and from the standpoint of instructions to the jury this would mean that the jury must be satisfied and must be so instructed) aside from the declaration itself that there is a conspiracy and that the defendant against whom the statement is sought to be used is a member thereof. This is the clear meaning of the cases and authorities cited by appellant (Carbo Op. Br. pp. 55-57), to which appellee has not replied nor analyzed. 5/

This is evident from the very formulation of the rule itself.

4/ Incidentally, this formulation by appellee in and of itself requires "the jury to compartmentalize", a process which appellee says a jury cannot be expected to do (Br. p. 315).

5/ We shall refer to Glasser v. United States, 315 U.S. 60, in a moment.

A declaration can be used against a non-present alleged co-conspirator defendant only if it is "in furtherance of the conspiracy". (United States v. Guido, 161 F.2d 492 [CA 3 1947]). By very definition, therefore, this presupposes that the existence of the conspiracy has already been proven. Thus the out-of-presence declaration is admitted not to prove the conspiracy (cf. appellee's quotation [Br. pp. 310-312] from United States v. Dennis, 183 F.2d 201, 230-231 [CA 2 1950], aff'd 341 U.S. 494), but to prove conduct in furtherance thereof. And, with due respect to the dictum relied upon by appellee from Dennis (appellee's quotation [Br. 314-15] from United States v. Marion, 107 F.2d 834, 843 [CA 2 1938], cert.den. 309 U.S. 664, actually supports appellant, not appellee), if the proposition there stated means that just because the court allowed the out-of-presence declaration into evidence, that establishes, so far as the jury is concerned, that a conspiracy has been shown and that the defendant against whom the declaration is sought to be used is a member thereof, and if it means that the jury can consider the out-of-presence declaration to show that a non-present defendant was a member of the conspiracy (as appellee says is the case [Br. p. 315]) then the formulation is, we respectfully submit, simply not the law and it does indeed permit "hearsay (to) lift itself by its own bootstraps" (Glasser v. United States, 315 U.S. 60, 75).

We respectfully disagree (see Appellee Br. p. 313) that appellants misplace their reliance on Glasser. It is obvious that when the courts speak in connection with the rule in terms of the evidence being "inadmissible", they mean it not only in the strict

and technical sense of being admitted into evidence, but also in the sense of being considered by the jury. Thus, in Schmeller v. United States, 143 F.2d 544, 551 (CA 6, 1944), the court said:

" ... (T)he court should have charged in connection with this subject that testimony as to conversations not in the presence of one or more of the various appellants and not binding on them were inadmissible against them unless the conspiracy was proved. "

And in Briggs v. United States, 176 F.2d 317, 320 (CA 10 1949), cert. den. 338 U.S. 861, reh. den. 338 U.S. 882, the Court said:

" ... In his final instructions to the jury, the court specifically stated that numerous witnesses had testified to conversations had with some of the defendants, and that in each instance, such conversations were had with only one of the defendants. He ... then admonished them that the existence of a conspiracy could not be established against an alleged conspirator by evidence of acts or declarations of others in his absence. And he went on to explain how the statements made by one, or to one of the defendants was not admissible against others until and unless by competent evidence the conspiracy was established, and the particular conspirator was

connected with it. "

Simply put: if the law is that a defendant's membership in the alleged conspiracy can be established only by evidence of his own acts and declarations, the defendant is entitled to such an instruction. There just is no such instruction in any of those given by the trial court. The instruction relied upon by appellee (Br. p. 309) given as to defendant Gibson alone (RT 7714-7715), but not as to any other defendant (RT 7717-7719), is not sufficient, even as to Gibson. In the first place it refers only to "guilt or innocence", not to membership in the conspiracy. And in the second place it refers to words or conduct "of any other defendant", thus leaving out the important instruction as to the unindicted alleged co-conspirator, Daly. It goes without saying that even if sufficient as to Gibson, which it is not, the instruction is not sufficient as to the other defendants as to whom the court flatly refused to instruct (RT 7719). And the giving of the instruction as to Gibson demonstrates that the trial court felt such an instruction was necessary. But the very giving of it as to Gibson alone was additionally prejudicial to the other defendants for it virtually told the jury that as to them, no such rule was applicable.

The cases uniformly say that defendants in a conspiracy case are entitled to the instructions requested here by appellants.^{6/}

^{6/} See United States v. Flynn, 216 F.2d 354, 362 (CA 2 1954), where the instructions given by the trial court included:

"In considering whether or not a particular defendant (Cont).

The entire argument of appellee, including its reliance upon the language it quotes from Dennis and its argument of no "compartmentalization" 7/ is, we think answered by Judge Mathes in his discussion of the problem in United States v. Schneiderman, 106 F.Supp. 892, 900-903 (SD Cal. 1952) in ruling on motions to strike.8/

6/ (Continued) became a member of the conspiracy, you must do so without regard to and independently of the statements and declarations of others. In other words, you must determine the initial participation of a particular defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the actions and conduct of others.

" . . .

"This instance of becoming a member of the conspiracy, as to which I have just instructed you, is the only instance in the case where a certain question can be determined only on the strength of certain evidence."

And cf. Bailey v. United States, 282 F.2d 421, 425 (1960) and Yuge v. United States, 127 F.2d 683, 689 (1942), cases in this Court.

7/ A process which is not unusual for a jury to be instructed about. For example: "You can consider this evidence only against this defendant and not against that one." Or, "this evidence can be considered by you only in connection with Count in the Indictment". And compare the complicated mental processes (compartmentalization, if you will) through which juries all over the country every day are instructed in an ordinary negligence case when the defense of contributory negligence is raised. (California Jury Instructions [B.A.J.I.] No. 113. And even more so when the plaintiff in such a case invokes the doctrine of Last Clear Chance [B.A.J.I. No. 205].)

8/ The convictions which later resulted in the case were reversed by the Supreme Court on the basis of other erroneous instructions (Yates v. United States, 354 U.S. 298) but not on those concerning the problem at hand and which are set out at Appx.A, below. See also this Court in the case Yates v. United States, 225 F.2d 146, 159 (1955).

We set out in Appendix "A", attached hereto, what was said as to what instructions would be given on the point. That such instructions are clearly correct and required is seen by this from the Supreme Court in Lutwak v. United States, 344 U. S. 604, 618-619:

"Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove the declarant's participation therein. The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only. . . .

"In the trial of a criminal case for conspiracy, it is inevitable that there shall be, as there was in this case, evidence as to declarations that is admissible as against all of the alleged conspirators; there are also other declarations admissible only as to the declarant and those present who by their silence or other conduct assent to the truth of the declaration. These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. . . . " (First emphasis in original - second and third emphasis ours).

The trial court did not do that here. Its failure to so do was prejudicial error.

B. A Trial Court's Instructing the Jury
That the Defendant May Appeal, Denies
The Defendant a Fair Trial (Reply to
Appellee's Point VI, C, 10, pp. 327-329).

Alice in Wonderland makes interesting reading (Appellee's Br. p. 327), but it does not answer the decisions of the courts (Carbo Supp. Br. pp. 3-4) to the effect that when a trial judge instructs a jury that if he makes a mistake, his action is subject to review by a higher court, such is reversible error and vitiates the trial.

The very words emphasized by appellee in its brief (p. 328) demonstrates the error of the trial judge in so instructing. Thus, compare the words appellee italicizes (Br. p. 328):

"In other words, my word is subject to a
review by higher courts; yours is not."

and (ibid):

"Now, the reason why your decision on the
facts is not subject to review on appeal "

with the words in United States v. Fiorito, 300 F.2d 424, 426
(CA 7 1962):

"That's why we have a court of appeals,
they will reverse me if I'm wrong. "

Nor was the jury conditioned as to the possibility of an

appeal only during the time of the instructions at the conclusion of the trial. At least on three other occasions during the trial and in the presence of the jury, the trial court let it be known that appeal was in the offing. Thus, during the colloquy wherein defendant Gibson was required to define the word "underworld", the Court said in the presence of the jury (R. 5047):

"Well, sir, I don't want to argue with you further.

If I am in error, the upper court can correct me. "

And again (R. 5048):

" . . . We are going to proceed in this fashion, and if it is prejudicial the gentlemen upstairs can take action on it. "

The third occasion was when arrangements were being made for playing Exhibit C to the jury and defense counsel requested that the reporter take it down (RT 1570). Said the Court (ibid):

"Well, Mr. Strong, I think the court will make an order that the tape or record be made an exhibit in the case so that it itself can go to the Circuit, if they need to review this procedure. "

As stated, appellee did not choose to deal with the Fiorito case and the cases therein cited. Nevertheless, the law is, as there so clearly set forth, that such conduct and instruction by the trial court "vitiates the trial".

C. The Overt Act Instruction (Reply to
Appellee's Point VI, C, 5, pp.
320-322).

Appellee virtually concedes (Br. pp. 320-321) that the instruction complained of is erroneous in the law. And, we submit, it cannot really be argued that there is no confusion when in one breath (RT 7651-7652) the jury is told that an act in furtherance of the conspiracy must have been committed by "one or more of the parties engaging in the conspiracy", and in another breath (RT 7645) that the act may be "done by one or more of the defendants or at their direction or with their aid".

What appellee is ultimately required to fall back upon (Br. p. 322) is the lack of an objection to the instruction after the instruction was given and before the jury returned. But this will not suffice. Since the principle goes to a fundamental part of the law of conspiracy, the giving of the erroneous instruction was plain error affecting the substantial rights of the parties and so Rule 52(b), Federal Rules of Criminal Procedure, applies. Moreover, appellee's contention based on Rule 30 demonstrates in a very real sense, the prejudice sought to be visited upon defendants by reason of the trial court's not advising what instructions it was going to give (See, e. g. , *Dragna Op. Br.* pp. 39-43).

D. The Aiding and Abetting Instruction
 (Reply to Appellee's Point VI, C, 7,
 pp. 323-324).

Appellee's very argument in seeking to uphold the instruction demonstrates the error and the prejudicial nature thereof.

Thus, appellee states (Br. p. 323): "the (aiding and abetting) instruction related the two conspiracy counts to the eight substantive counts". In other words, says appellee, there is no need to keep the various counts separate; the whole thing is one hodge-podge and everything can be thrown in and considered without reference to whether or not it applies to the count charged. Unfortunately, this is precisely what was done in the court below and appellee's argument as to the validity of the aiding and abetting instruction demonstrates that this is so.

But the law is that "each count in an indictment is regarded as if it was a separate indictment". (Dunn v. United States, 284 U.S. 390, 393). "Although distinct offenses were charged in separate counts in one indictment, they nevertheless retained their separate character . . . " (Selvester v. United States, 170 U.S. 262, 268).

And appellee's argument (Br. p. 324) that Gibson and Dragna could have been charged with substantive crimes under the theory of Pinkerton v. United States, 328 U.S. 640 and, as explained in, Nye & Nissen v. United States, 336 U.S. 613, 619, runs full force into the constitutional right to due process of law. Whether these two defendants could have been so charged is beside the point;

the fact is that they were not so charged (hence the Pinkerton and Nye & Nissen cases are not applicable). And so what appellee's argument amounts to, and it demonstrates the force of appellant's claim to the error of the instruction, is that a defendant can be found guilty of a count charged based upon evidence attributable to a count not charged. This violates due process. "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." (Cole v. Arkansas, 333 U.S. 196, 201, citing DeJonge v. Oregon, 299 U.S. 353. 362).

Accordingly, when appellee argues (Br. pp. 323-324) for the relationship of a defendant in connection with a count with which he was not charged to prove a count with which he was charged, it is arguing for a conviction in violation of due process, thus demonstrating the invalidity of the aiding and abetting instruction.

IV.

EVIDENCE WAS IMPROPERLY RECEIVED

- A. The Daly Statements Were Inadmissible
(Reply to Appellee's Point VI, B, 8,
pp. 267-281).
-

If the recordings (Exhs. 100-102, 176) of the May 14, 1959 conversation between Daly and Leonard were not introduced for the purpose of showing what Leonard said in that conversation (and

appellee claims [Br. p. 267] they were not) then they were inadmissible under DiCarlo v. United States, 6 F 2d 364, 366 (CA 2 1925), cert. den. 268 U.S. 702, cited by appellee (Br. p. 267) because Leonard's testimony of that conversation (RT 755-761) ^{9/} was really not testimony as to a conversation but rather a recital of what Daly is supposed to have said.

But the more grievous error of appellee in its argument under this point is that it tries to show that Daly was a co-conspirator and therefore that his statements out of the presence of the defendants could be used against the latter (Appellee Br. pp. 268-277), by doing the very thing the law says cannot be done: use the statements which are the very subject of the objection to establish their own right to be admitted in evidence. ^{10/} Appellee is thus attempting to have "hearsay . . . lift itself up by its own bootstraps to the level of competent evidence". (Glasser v. United States, 315 U.S. 60, 75). Irrespective of whether a defendant is entitled to an instruction to the jury as to the law on this subject, ^{11/}

^{9/} In Carbo's Op. Br., p. 59, this reference is given as RT 432-438. This was in error. That was the old pagination of the Reporter's Transcript before the reporter prepared it for use on appeal.

^{10/} E.g., appellee says (Br. p. 273): "The contents of Daly's remarks on May 13 and May 14 provide circumstantial evidence of his complicity with appellants, since he reveals knowledge of the activities of the conspirators in these two conversations, activities with respect to Leonard, which could not have been known to him unless one or more of the conspirators had taken him into their confidence during the course of the conspiracy."

^{11/} This matter is discussed supra under Point III, A.

there is no doubt in the law that "such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy" (ibid at p. 74).

Accordingly, stripping appellee's argument of its reliance on Daly's out of presence statements (Br. pp. 268-270), there is simply no, and certainly not sufficient, evidence aliunde to show that Daly was a co-conspirator. ^{12/} Significantly, appellee makes no effort to summarize the evidence aside from Daly's statements which even in its own view it contends shows Daly to be a co-conspirator. Instead it says (Br. p. 273): "(I)f Daly were not a member of the conspiracy charged how did he become so conversant with the facts of the relationship among Gibson, Palermo, and Carbo, in connection with the demand for control of Jordan?" citing (ibid), of all things, "Exhs. 100-102, 176, 101-A for Ident. at pp. 10, 21, 24, 30, 44-45", the very thing we are saying was inadmissible. This is a vivid demonstration of appellee's "boot-strap" argument.

Nor, in view of the motions to strike the Daly conversations at the close of the prosecution's case (see f.n. 12, supra), can the

^{12/} Incidentally, appellee is in error when it states (Br. pp. 269 and 280) that defendants did not object to the Daly-Leonard, May 13, 1959 conversation. This clearly came under the "umbrella" ruling of the court (e.g. RT 412-413, 593-594, 2191) whereby objection did not have to be made to each such conversation because of the court's ruling on "order of proof" and subject to "motion to strike" (ibid). Said motions to strike the very May 13 conversation were appropriately made (e.g. CT 786, lines 13-14; 792-795; 798, line 21 and 30-32; 806, line 25); they were denied (CT 823).

prosecution save itself by reliance upon evidence produced as a part of the defendants' case (Appellee's Br. pp. 272-276) The question here is as to the admissibility of the evidence. It is enough that the defense be required to witness the evidence introduced, albeit conditionally, before the jury and heard by it on the theory of "order of proof" and "subject to a motion to strike". Certainly by the time the motion to strike is made, the prosecution's showing is complete; by that time the order of proof has ended. Since, as appellee's own argument seems to admit, there was not sufficient evidence aliunde by that time, the motions to strike should have been granted and the jury not permitted to consider it. The question of how well or how poorly defendants rebut evidence which has been permitted to remain against them (see cases cited in Appellee's Br. p. 275) is irrelevant, since the evidence was inadmissible in the first place.

With regard to appellee's startling assertion (Br. p. 277) that out-of-presence "declarations need not be in furtherance of the conspiracy so long as they are made by a co-conspirator during the period of conspiracy", we respectfully submit that this is an incorrect statement of the law. Appellee characterizes (Br. p. 279) the correct formulation by the United States Supreme Court ^{13/} as obiter dictum. Not so. It is true that in the cases cited by appellant (Carbo Br. p. 61), the statements were after the

^{13/} E. g. Paoli v. United States, 352 U.S. 232, 237: "But such declarations can be used against the (non-present) co-conspirator only when made in furtherance of the conspiracy."

termination of the conspiracy. And it was for this reason that they were there inadmissible: since the statement must be "in furtherance of the conspiracy", such could not be the cases there where the conspiracies had ended. But the principle enunciated by the Court is clear.

For a case holding that a declaration not made in furtherance of the conspiracy though made by an admitted co-conspirator during the conspiracy cannot be used against other co-conspirators not present, see United States v. Guido, 161 F.2d 492, 494-495 (CCA 3 1947):

" ... Whether the conspiracy, alleged in count 4 of the indictment, based on the Espionage Act of 1917 came to an end on January 29 or January 30, 1943, and whether the conspiracy alleged in count 2, based on the Selective Training and Service Act, was a completed offense at a much earlier date by the simple agreement of the parties to the conspiracy to procure Frank B. Guido's release from the army, need not be decided for it is clear that the statements made by Frank B. Guido on January 30, 1943 were not in furtherance of the conspiracy. It follows that under the decision of the Supreme Court in Fiswick v. United States, 329 U.S. 211, 217, 67 S.Ct. 224, these statements of Frank B. Guido were not admissible in evidence against the appellants.

" ... The learned judge should have charged that since the admissions or confessions alleged to

have been made by Frank B. Guido were not in furtherance of the conspiracy, it was immaterial whether or not the conspiracy was still in existence, had been consummated, or had terminated and that the evidence given by the waitresses and the cook was admissible only as to Frank B. Guido. "

Although, as we have shown (Carbo Br. Appx. C & D) the Daly-Leonard conversation was a hodge-podge of irrelevancies, including the portion relied upon so heavily by appellee (Br. pp. 279-280) concerning one Ray Arcel, appellee chooses (ibid) that portion of the "conversation" to show that Daly was talking in furtherance of the conspiracy -- to threaten Leonard. But how could this be so? Who brought up Arcel? Who asked about Arcel? How did the name Carbo come in in connection with Arcel? All these questions are answered by the name: Leonard. 14/

We submit that a fair reading of the Daly-Leonard conversation must result in the conclusion that it was not, whatever else it might be, in furtherance of the conspiracy.

14/ Thus Leonard brought up the subject of Arcel (Exhs. 100-102, 101-A, CT 1388): "You know they didn't like about Arcel. You know Arcel thought he was pretty smart too." And Leonard asked (ibid): "They never did get him either, did they?" And Leonard asked (ibid): "Did Arcel really see him or not? He probably didn't even know what hit him?" Appellee asserts that when Daly answered this type of question, his responses were statements made in furtherance of the conspiracy. Such illogic cannot be permitted. And it was Leonard, not Daly, who said (ibid): "Well, he was with Carbo for years."

B. Illegally Obtained Evidence Was Admitted

- (1) Exhibits 100, 101, 102 and 176
(Reply to Appellee's Point VI,
B, 4(b), pp. 243-248)
-

While, understandably, appellee attempts to state its case in the worst possible light from the standpoint of appellants, it simply is not the case, as asserted by appellee (Br. p. 245), that Leonard was "specifically ordered" (emphasis added) to see Daly in the latter's hotel room. It was a perfectly normal arrangement such as made thousands of times daily by business men and acquaintances to meet at another time and place (RT 754).

Be that as it may, whatever description is put to the mechanics of Leonard's being asked to meet Daly in the hotel room the next day, it was Leonard who was asked to come, not the Los Angeles Police Department. For in appellee's counsel's own view and words, when Leonard went into the Daly hotel room, wired for sound as he was, he went there as "an authorized operator . . . for the Los Angeles Police Department" (RT 7943).

In our opening brief (Carbo Op. Br. pp. 62-63) we suggested that this Court's decision in Todisco v. United States, 298 F.2d 208, cert. den. 368 U.S. 989, was not correctly decided, based as it is on On Lee v. United States, 343 U.S. 747, which, we urged, no longer represents the law by reason of the later Supreme Court decisions. Accordingly, we urged this Court to reconsider Todisco and to overrule it. We believe we were right

in that suggestion and are still of that view. However, upon further reflection, we believe this Court can, and should, hold for appellants on the basis of violation of the Fourth Amendment without upsetting the reasoning of Todisco. This it can do on a ground not advanced in Todisco (nor in On Lee) but which is, we believe, sound, Fourth Amendment-wise.

Before discussing this phase of the matter, however, we shall dispose of appellee's erroneous argument questioning appellants' standing to object to the Fourth Amendment violation by the search of the Daly hotel room.

In the first place, the Government cannot have it both ways. It urges that the Daly transcription is admissible because in the whole transaction Daly was acting as one of the co-conspirators and as an agent of at least one of the defendants (Appellee Br. p. 276). It makes much (Br. p. 272) of the fact that Daly's expenses at the hotel were paid by defendant Gibson's company. Surely, then, the principal has standing to complain of violation of right as to the agent's premises, since the agent's premises are those of the principal. Since it is only on the theory that Daly's conduct, including his very being in and occupying the hotel room itself, was the same as that of the defendants (Appellee Br. p. 280) that his out-of-presence statements are at all admissible against them, this on the theory that it was the conspiracy at work, the Government is hardly in a position to say that violation of the rights of one of the conspirators is not a violation as to all (Cf. Weiss v. United States, 308 U.S. 321; and see particularly the Court of Appeals

decision in that case which articulated the invalidity of the Government's argument here)^{15/}.

By naming a defendant as a co-conspirator, the prosecution lays the basis for the use, against the defendants (his alleged co-conspirators) of the declarations of the named co-conspirator. By intentionally not naming him as a co-defendant, the prosecution can, so it asserts, use his out-of-presence declarations (although the result of an illegal search) when, concededly, if he were named a defendant, such declarations (if obtained in violation of the Fourth Amendment) could not be admitted into evidence. (Weiss v. United States, supra, 308 U.S. 321; McDonald v. United States, 335 U.S. 451, 456; Anderson v. United States, 318 U.S. 350, 356-357).

We submit that appellee's argument cannot be permitted to prevail. If it does, then a way has been found to circumvent, while violating the Amendment, the dictates of the Fourth Amendment. By the device of not indicting a co-conspirator, but at the same time violating his Fourth Amendment rights, the way is open, so says appellee, to introduce evidence illegally obtained. But the Fourth Amendment, nor any constitutional right, is not so

^{15/} " ... It may be said with some plausibility that the defendant Goldstein was not prejudiced since he was neither a party to, nor mentioned in, the conversations obtained through wire tapping. These conversations, however, showed that Goldstein's codefendants were engaged in a conspiracy which other proof indicated that he joined. They also gave credence to the testimony of Messman. Such evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received. ... " (103 F.2d 348, 352).

easily subverted. As this Court has said (Taglavore v. United States, 291 F.2d 262, 266 [1961]):

"The violation of a constitutional right by a subterfuge cannot be justified, ... (otherwise) a mockery could be made of the Fourth Amendment and its guaranties. ..."

Furthermore, appellants' interest in the hotel room was surely equal to, and gave appellants as much standing, as the defendant in Jeffers v. United States, 342 U.S. 48, where the hotel room was that of the aunts of the defendant who had not given defendant permission to store the narcotics which were seized there. Jeffers had not checked into his aunts' room either. 16/

Moreover, appellee fails to appreciate and give support to what is the basis for the rule as to the inadmissibility of evidence obtained in violation of the Fourth Amendment. It is clear that the reason for the rule is to deter law-breaking on the part of the

16/ Neither of the two cases relied upon by appellee (Br. p. 245) assists it. The articles referred to in appellee's reference to Abel v. United States, 362 U.S. 217, 240-241, which were taken from the wastepaper basket after Abel had paid his bill and vacated the room were, as the court pointed out, abandoned articles. As the court said (362 U.S. at 241), "There can be nothing unlawful in the Government's appropriation of such abandoned property." Furthermore, again as the court pointed out (*ibid*), Abel had vacated the room and gave up his occupancy thereof. The control was then in the hotel, which gave its consent to the search. This Court's later decisions in Plazola v. United States, 291 F.2d 56, 63 (1961) and Contreras v. United States, 291 F.2d 63, 65 (1961) demonstrate that the footnote in this Court's decision in Eberhardt v. United States, 262 F.2d 421, 422 (1958), no longer represents the law.

Government and not permit the federal courts (indeed any court in the land [Mapp v. Ohio, 367 U.S. 643]) to be a party to a process of law violation by the Government.

Thus, in the Mapp case, supra, the court, in commenting on its decision in Elkins v. United States, 364 U.S. 206, which overturned the "silver platter" doctrine, said (367 U.S. at 654):

"... The Court concluded that it was therefore obliged to hold, although it chose the narrower ground on which to do so, that all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source. ..."

And the court quoted from (367 U.S. at 659) and adopted the judicial philosophy of Mr. Justice Brandeis' famous dissenting opinion in Olmstead v. United States, 277 U.S. 438, 485:

"... 'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. ... If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.' ..."

It will be remembered that in this same opinion, Mr. Justice Brandeis, in pointing out how strong is the rule against permitting the use by the Government of evidence illegally obtained, said that even if the defendant waives the objection, nevertheless "the objection ... will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation.

The court protects itself. " (Emphasis added; 277 U. S. at 485).

And so in Mapp, the court specifically noted (367 U. S. at 651) the adoption of the exclusionary rule by California in People v. Cahan, 44 Cal. 2d 434 and pointedly called attention (367 U. S. at 651) to the reasoning in that case wherein the California Supreme Court said (44 Cal. 2d at 445) it was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions". This reasoning the court re-affirmed in Mapp (367 U. S. at 652-653).

As the Court said in Elkins v. United States, 364 U. S. 206, 217:

" . . . The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it. . . . "

Accordingly, this Court cannot permit the argued for formula advanced by appellee and thus present an incentive to law enforcement officers to, indeed, flout "respect for the constitutional guaranty".

Other Supreme Court decisions, for example, Walder v. United States, 347 U. S. 62, 64-65 and McDonald v. United States, 335 U. S. 451, 456, prompted the California Supreme Court to say (People v. Martin, 45 Cal. 2d 755, 760):

"The United States Supreme Court has clearly

recognized that the purpose of the exclusionary rule is not to provide redress or punishment for a past wrong, but to deter the lawless enforcement of the law. . . ."

And so, to deter such lawless law enforcement, according to the California Court (45 Cal. 2d at 761), "whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's rights". Otherwise (45 Cal. 2d at 760), the courts are "'constantly required to participate in, and in effect condone, the lawless activity of law enforcement officers' ". Continued the California Court, as though speaking of the very case at bar (ibid):

"This result occurs whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence, and if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them. "

It may be that the California Supreme Court in the Martin case, supra, 45 Cal. 2d at 761 (see also, People v. Gale, 46 Cal. 2d 253, 257) has too broadly stated the effect of the applicable United States Supreme Court decisions upon which it relied. But this Court need not decide that question in this case. As argued elsewhere (Point IV, A, supra), the Daly-Leonard conversation was inadmissible because, inter alia, Daly was not shown to be a co-conspirator. If, however, the court should rule against appellants on this point, then by that very token -- i. e., admissibility on the theory of a declaration made by a co-conspirator in furtherance of the conspiracy during the existence thereof -- appellants are sufficiently directly involved. (Cf. Weiss v. United States, 308 U.S. 321; McDonald v. United States, 335 U.S. 451, 456; Anderson v. United States, 318 U.S. 350, 356-357, supra).

Appellants have standing to object.

We turn now to a discussion of the unargued and, therefore, unconsidered question in the Todisco case, namely, whether the electronic eavesdropping conduct of the Government officers here was illegal and in violation of the Fourth Amendment because it was a search for evidence.

It cannot be gainsaid that the Los Angeles Police Officers through their "authorized operator", Leonard, were engaging in their electronic eavesdropping for the purpose of, and they were, searching for evidence and not, for example, for weapons, contraband or instrumentalities of crime. Their very purpose, and their only purpose, in wiring Leonard for sound was to search for

evidence of crime. But assuming that Leonard, and his electronic partners, were lawfully in the hotel room and therefore committed no trespass, the search was nevertheless unlawful. A search of another's premises for evidence is not permitted by the Fourth Amendment whether with or without a search warrant. This is a distinction which is deeply rooted in the law and recognized by all courts, including, of course, this one.

In Gilbert v. United States, 291 F.2d 586, 596 (1961), this Court said:

"We think we must recognize and respect
' * * * the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including [1] the instrumentalities and means by which a crime is committed, [2] the fruits of crime such as stolen property, [3] weapons by which escape of the person arrested might be effected, and [4] property the possession of which is a crime.' Harris v. United States, supra, 331 U.S. at page 154, 67 S.Ct. at page 1103. (Numbers inserted.)"

Nor was this new doctrine for this Court. As said in Woo Lai Chun v. United States, 274 F.2d 708, 710 (1960):

" ... In Takahashi v. United States, 9 Cir., 1944, 143 F.2d 118, at page 123, we laid down the general proposition 'that a reasonable seizure can only be made of instrumentalities of the crime itself and not of private papers which are mere evidence or indicia of the commission of a crime'." (Emphasis added).

That this Court is clearly correct is seen from a number of Supreme Court cases. For example, United States v. Leftkowitz, 285 U.S. 452, 454-456:

"Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were." (Emphasis added).

And Abel v. United States, 362 U.S. 217, 234-235:

" ... We have held in this regard that not every item may be seized which is properly inspectable by the Government in the course of a legal search; for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them, ... " (Emphasis added).

And United States v. Rabinowitz, 339 U.S. 56, 64:

"There is no dispute that the objects searched for and seized here, having been utilized in perpetrating a crime for which arrest was made, were properly subject to seizure. Such objects are to be distinguished from merely evidentiary materials which may not be taken into custody. . . . This is a distinction of importance, for 'limitations upon the fruit to be gathered tend to limit the quest itself. . . . ' . . ." (Emphasis added).

What appellee did here was listen to two and one-half hours of the private life of Daly in his hotel room, listening to both the relevant and irrelevant "in the hope that evidence of crime might be found". (Go-Bart Importing Co. v. United States, 282 U.S. 344, 358). As in United States v. Leftkowitz, 285 U.S. 452, 462, "the search (was) general, for nothing specific . . . and based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light". Such conduct violates, in a very fundamental sense, the rights guaranteed by the Fourth Amendment. For, as said in Federal Trade Commission v. American Tobacco Company, 264 U.S. 298, 306:

" . . . It is contrary to the first principles of justice to allow a search through all of the respondents' records, relevant or irrelevant, in the hope that something will turn up. "

It matters not that the rummaging here was of Daly's private conversation and not physically of his drawers and papers.^{17/} As said in Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 751

" ... It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; ... "

Since the officers here were searching for evidence of crime, their conduct violated the Fourth Amendment and the evidence thus obtained was, consequently, inadmissible.

We do not think it can be argued that electronic eavesdropping is not a "search".

Mapp v. Ohio, 367 U.S. 643, in quoting (at page 659) from the dissent in Olmstead v. United States, 277 U.S. 438, which clearly held wire-tapping to be a search, and in commenting (367 U.S. at 654) upon the court's previous decision in Irvine v. California, 347 U.S. 128, 134, recognized that electronics eaves-

^{17/} Cf. Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 474: "Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions."

dropping was a search. In the Irvine case, a concealed microphone case, the Court said (347 U.S. at 132):

" ... Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busybody. ... Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment. . . . "

And in comparing Irvine with Wolf v. Colorado, 338 U.S. 25, the Court said (347 U.S. at 133):

" ... Actually, the search was offensive to the law in the same respect, if not the same degree, as here. "

Even Goldman v. United States, 316 U.S. 129, and On Lee v. United States, 343 U.S. 747, though deciding that there was no Fourth Amendment violation because there was technically no trespass (in neither of these cases so far as appears from the reported decisions was the "search for evidence" argument made), did the court even suggest that no "search" was made. On the other hand, Silverman v. United States, 365 U.S. 505, clearly recognizes that "listening in" is a search. Thus, the Court said (at page 512):

" ... This Court has never held that a federal

officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard. "

We think it self-evident that if the eye can search, so also can the ear. Indeed, when the ear is extended by means of electronics, the search is the more pervasive.

Accordingly, we submit, the search here being for evidence, it violated the Fourth Amendment. The exhibits should have been excluded. 18/

18/ Appellee's reliance (Br. p. 248) on Walder v. United States, 347 U.S. 62, 65, as ground for the admissibility of Exhibit 176 is misplaced. In the first place, Exhibit 176 is simply the same thing as Exhibits 100 and 101 which were introduced not on rebuttal as a result of evidence brought out by the defendants in their case in chief, but were introduced directly as a part of the Government's case in chief. Moreover, Exhibit 176 being, as appellee states, exactly the same as 100, and Exhibit 101-A for Identification being a typewritten transcription of both of them, the latter shows on its face by the asterisks (explained as meaning "unintelligible word or phrase" [CT 1357]) that there were omissions in 101-A for Identification from what was said on May 14th. Indeed 101-A shows that there were not 10, as counted by appellee (Br. p. 246, but 107 asterisks (omissions) from 101-A for Identification. Daly was shown Exhibit 101-A for Identification not 100 (RT 3126), and asked if there were subjects discussed between him and Leonard on May 14 "that are not referred to in that transcript" (emphasis added; RT 3126). Since the transcript on its face shows that there were omissions, how can the introduction of 176 show that there were not? In any event, even if Exhibit 176 was properly allowable at that stage of the proceedings, that fact cannot cure the error of the introduction of Exhibits 100-102 as a part of the prosecution's case in chief.

As pointed out in the Opening Brief (Carbo Op. Br. p. 64) Rathbun v. United States, 355 U.S. 107, does not, as appellee urges it does, apply to the type of device which was used in the case at bar. Carnes v. United States, 295 F.2d 598 (CA 5 1962), cert. den. 369 U.S. 861, is not, we submit, correct law.^{19/} It should be noted that, as will be seen from the discussion below, the court in that case, though quoting (295 F.2d at 602) the portion from Rathbun (355 U.S. at 111) which points up the narrowness of that decision and the rationale thereof, failed to apply that reasoning to the case before it. Additionally, in the Carnes case, the violation of the Regulations of the Federal Communications Commission, discussed hereinafter, which was involved in the officer's conduct, was not called to the attention of the Court of Appeals or the Supreme Court. The Solicitor General, in his opposition in the latter court urged this failure as one of the grounds for opposition to the granting of certiorari. (Brief for United States in Opposition, pp. 8-9, No. 786, Oct. Term 1961). Not only is appellant here calling the FCC regulation to this Court's attention, but it likewise called attention thereto in the court below (CT 1288-

^{19/} Contrary to appellee's assertion (Br. p. 241), there is no showing that the recordings introduced by defendant Palermo (Exhs. C, D and E) were obtained by means of an electrical induction coil attached to the telephone receiver, as were the means used by appellee here (Appellee's Br. p. 241).

In Rathbun, the court carefully made a distinction between the reception in evidence of testimony by a person who was listening in, with the permission of the subscriber, on an extension phone, so-called, and a recording of a conversation by the means used in the case at bar: an electrical induction coil attached to the telephone itself (Appellee's Br. p. 241).

At page 64 of our Opening Brief we set forth the limited question that was before the Supreme Court in Rathbun. The whole tenor of the Court's opinion makes clear that it was only because the hearing by the third party was on a regularly installed extension phone, not a device installed on the phone for the purpose of hearing that conversation, that it held there was no interception and therefore no violation of §605.

Thus, the court said (355 U.S. at 108):

" ... This extension had not been installed there just for this purpose (to overhear this particular conversation) but was a regular connection, previously placed and normally used. ... " (Emphasis added).

As distinguished from an induction coil placed on a telephone for the specific purpose of overhearing a particular conversation, the Court pointed out:

Pages 109-110:

"The telephone extension is a widely used instrument of home and office, yet with nothing to evidence congressional intent, petitioner argues

that Congress meant to place a severe restriction on its ordinary use by subscribers, denying them the right to allow a family member, an employee, a trusted friend, or even the police to listen to a conversation to which a subscriber is a party. . . . " (Emphasis added).

Page 111:

"Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. . . . " (Emphasis added).

Contrary to the situation thus spoken of by the Court, a party to a telephone conversation does not take the risk that the party on the other end will have a device attached by Governmental investigative agencies to the telephone which, without his knowledge or consent, records the conversation. Contrary to the use of an extension phone and the listening thereon, the use of the induction coil device without the consent of the party, has all the vice of an actual wiretap and falls within the conduct Congress sought to ban by §605; it is another variant of official intrusion into privacy.

The Government in its brief before the Supreme Court in Rathbun recognized the distinction and pointedly made it in support of its argument. Thus in its brief, the Solicitor General argued:

Page 12:

"The legislative history shows that Congress intended to safeguard the privacy of means of communication by forbidding the surreptitious interjection of an independent device for the purpose of interception by a listener or a recorder, not to protect the message from disclosure by the receiver." (Emphasis added).

Page 14:

"The issue in this case, therefore, is whether listening on an extension telephone is an interception imposed upon the communication system or merely the overhearing of a message sent through a system which has not been tampered with."

To show that an extension phone is not a "surreptitious interjection of an independent device for the purpose of interception by a listener or a recorder", the Government further said in its brief (page 17, f. n. 9):

"The use of the term 'extension' may be misleading. In general use, all telephone instruments installed in a home are on a parity; no one is the principal receiver and the others subsidiary. In this case, it appears to have been a matter of chance, or convenience, which instrument Mr. Sparks used.

Thus, the use of the word 'extension' really means another regularly installed telephone instrument." (Emphasis added).

And demonstrating the difference between a regularly installed and used extension phone, and the device used in the case at bar, the Solicitor General called the following to the attention of the Court (pp. 16-17, f.n. 8):

"Orders of the Federal Communications Commission dated November 26, 1947, and May 20, 1948, applying to interstate and foreign calls, require telephone common carriers to post tariff schedules for the permanent attachment of mechanical recorders and transcribers to subscriber telephones. The attachment is usually made at the bell box of the telephone instrument and may be made only by the telephone company. A condition of such an installation is that an automatic tone warning device be used in connection with it. If the subscriber makes his own permanent connection and does not use the warning device he commits a breach of his contract with the telephone company and may be subject to the sanctions of 47 U.S.C. 401 and 411. However, there are three general types of recording devices which may be used with a telephone circuit. The first relies upon a direct physical connection to the telephone circuit. This system is subject to detailed regulation as

mentioned above. 20/ The second is the inductive type which relies upon the use of an induction coil placed in proximity to the telephone lines. The Commission regards its use as prohibited by the Commission's orders. The third is the accoustic type which amplifies and records the telephone message as it is reproduced at the handset. The Commission expressly has not attempted to regulate the use of this type. (Citation)." (Emphasis added).

Thus, it is clear that there is a vast difference between the use of a regularly installed telephone extension and the surreptitious use of an induction coil made recording. It is this latter which is Exhibit 177. We submit that the Federal Communications Commission is correct and that the use of such a device is illegal.

47 U. S. C. 502 provides that violation of "any rule, regulation, restriction, or condition made or imposed by the (Federal Communications) Commission" is a crime. In contradistinction to the argument of appellee (Br. p. 248) that the rules as to operating a radio without a license have to do with the avoidance of jamming the electronic spectrum, and therefore operation without a license should not result in the inadmissibility

20/ Cf. United States v. Stephenson, 121 F.Supp. 274 (DC DC 1954) app. dism. 223 F.2d 336 (CA DC 1955) holding inadmissible a recording made from this type of an installation without the "beep".

of the evidence so obtained (e. g. Exhibit 176 in this case), the Commission's regulations as to tampering with telephone wires or instruments are directly concerned with the "guarantee (of) rights of privacy" as protected by 47 U.S.C. 605, and violation thereof should come directly within the rule of exclusion (Nardone v. United States, 302 U.S. 379 and 308 U.S. 338).

The Exhibit should not have been admitted into evidence.

C. Nesseth's and McCoy's Out-of-Presence
Statements as to What Leonard Said Some
Of the Defendants Said (Reply to Appellee's
Point VI, B, 5; pp. 249-252).

(a) Replying to our contention that the testimony of Nesseth and McCoy as to what Gibson, Palermo and Carbo, respectively, had allegedly told Leonard, was hearsay and inadmissible (Carbo Op. Br. pp. 17-19, 65), the prosecution contends that this testimony was admissible because "Leonard was used as a conduit of threats intended by appellants for Jordan's managers, Nesseth and McCoy"; that "[f]or the purposes of these messages, Leonard was a talking agent of appellants" (Appellee's Br. p. 249).

There is no showing in the record that Leonard was used as a "conduit" nor as an "agent of appellants". As a matter of fact, the indictment charges in Counts I and V that the appellants were to use threats of physical harm and violence to Leonard as well as

to Nesseth in order to obtain a share of the purses earned by the fighter Jordan (CT 3, 9); that they intended to obtain monies from "the victims" Nesseth and Leonard without paying any consideration therefor (ibid and 10); that Sica and Dragna were enlisted to contact Leonard and Nesseth and obtain their agreement to the conspirators' demands (CT 3, 10); and, finally, Gibson was to use his influence to persuade Leonard and Nesseth to accede to the demands of the conspirators (CT 3-4, 10). In Counts II and III (CT 6, 7), the extortion and attempted extortion counts, Leonard is the person allegedly threatened. Counts VI and VII (CT 12, 13) charge interstate telephone threats by Palermo and Carbo, respectively, to injure Leonard. Counts VIII and IX (CT 14, 15) charge interstate telephone threats by Carbo and Palermo, respectively, to injure Leonard and Nesseth; and Count X (CT 16) charges an interstate telephone threat by Palermo to injure Leonard and Nesseth.

So we find that not only was Leonard not the agent of these appellants, or any of them, but he was alleged to have been the victim of their extortion and attempts to extort; and the testimony of the prosecution witnesses was offered for just that purpose -- to show that attempts were made to extort from Leonard and, in fact, to show an actual extortion of \$1,725.00 from Leonard. The prosecution witnesses testified also as to the threats of physical violence purportedly made by Carbo against Leonard.

In the purported conversation between Carbo and Leonard on January 27, 1959 in which Carbo is supposed to have told

Leonard, among other things, that if the money wasn't there right away somebody would be looking him up (5 RT 658; Appellee's Br. pp. 48-49), there is nothing therein indicating that that statement was to be transmitted to Nesseth, and Nesseth's testimony as to what Leonard told him was as follows:

"[T]he substance was that if these people didn't get the money that they felt they had coming from the Jordan-Gutierrez fight, they were going to take it out of Leonard's hide. This wasn't actually all that was said, but that was the substance of it. [13 R.T. 1798.]" (Appellee's Br. p. 50).

There, too, it will be observed, nothing was said with reference to that statement's being something which Leonard was to tell to Nesseth.

And the same situation applies to the telephone conversation purportedly had between Carbo and Leonard on April 28, 1959 in which Carbo is supposed to have threatened Leonard, and Nesseth was permitted to testify as to what Leonard told him Carbo had purportedly said to Leonard on the phone (5 RT 680-681; Appellee's Br. p. 65). In that purported conversation between Leonard and Carbo not one word was mentioned with reference to Nesseth nor to transmitting the contents of the conversation to him, and while Nesseth was permitted to testify that Carbo had told Leonard to tell "that blankety-blank car salesman nobody has ever gotten away with this and he won't get away with it either" (13 RT 1824) there is nothing other than Nesseth's statement in the record to

indicate that that statement was ever made by Carbo or that he had authorized Leonard to make such a statement to Nesseth; in fact, Leonard does not testify that such a statement was made by Carbo (5 RT 680-681).

The same situation prevails with reference to the purported phone call from Palermo to Leonard within a few minutes after the call of April 28th just referred to (13 RT 1827-1828; Appellee's Br. p. 67). Here again nothing was said about Nesseth in that phone call, either about Leonard's telling Nesseth about the phone call, or otherwise. And yet as the prosecution put it, "Nesseth also corroborated Leonard's testimony as to Palermo's threatening call" (13 RT 1827-1828; Appellee's Br. p. 67; emphasis added).

If there had been statements made to Nesseth by Leonard as to what Carbo is purported to have said to Leonard, the question first is, were those statements to Nesseth made by Leonard pursuant to a direction from Carbo, or were they made to serve some purpose of his own.

We submit that there is nothing in the evidence to warrant a finding that Leonard's statements to Nesseth were made pursuant to a direction or authority of Carbo, and nothing to show that Leonard was acting as an agent of Carbo nor of any of the other appellants.

Moreover, the theory of the prosecution being that Leonard was acting as agent of Carbo in relating to Nesseth what Carbo purportedly said to Leonard, then the court should have instructed the jury upon the necessity of the prosecution's establishing the

principal-agency relationship between Carbo and Leonard and the rule as to how and in what manner a principal can be bound by the acts of an agent in a criminal case.

Under the contention that Leonard was acting as an agent of the appellants in connection with the statements made by Leonard to Nesseth and McCoy, the prosecution makes the following observation:

" ... No hearsay danger is involved since the declarant (Leonard) testified to the original event (the call or meeting with the conspirators) and was subject to cross-examination thereon before Nesseth or McCoy corroborated Leonard's testimony that he had communicated the threats to them. " (Emphasis in original; Appellee's Br. p. 249).

No authority is cited in support of this unique principle.

We fail to see how the fact that Leonard had testified to the matters which were the subject of his statements made to Nesseth and McCoy and/or the fact that he was subject to cross-examination thereon before Nesseth or McCoy "corroborated" Leonard's testimony that he had communicated the threats to them, removes the matter from the hearsay rule. Leonard was not a defendant, and he was not a co-conspirator. The statements made by him to Nesseth and McCoy were made outside of Carbo's presence and without his knowledge. Furthermore, it was not only Nesseth's and McCoy's testimony that Leonard "had communicated the threats

to them" (and which the prosecution says thus corroborated Leonard's testimony to that effect) to which we are directing our attack; more serious was the actual repetition by Nesseth and McCoy of the details of the statements made to them by Leonard. As was the case with Leonard, neither Nesseth nor McCoy was a defendant nor a co-conspirator and what they purportedly heard from Leonard and to which they were permitted to testify was plain hearsay.

(b) The next proposition stated by the prosecution under this point is that

"Since fear in the minds of the victims is a necessary element in an extortion case, evidence circumstantially establishing this state of mind is competent, material, and relevant. . . . " (Appellee's Br. pp. 249-250).

No one could quarrel with that principle of law, but we fail to see its applicability to the issue involved here.

Under that rule, the evidence has to be of some probative value. The mere fact that the victim told some one else that he had been threatened is not necessarily proof that he was in fear, and certainly cannot be used as substantive evidence that the threats had been made. In other words, the statements of Leonard to Nesseth had no probative value in establishing Leonard's fear. If we assume that the declarations were made for that purpose, then, under the prosecution's theory those declarations were

evidence only as to Leonard's state of mind -- but they were not and could not be substantive evidence that the threats had been made by Carbo.

However, in addition to the fact that the evidence is not sufficient to show Leonard's state of mind, and cannot be used as substantive evidence to prove that Carbo made the threats, the prosecution finds itself in this position: that in the trial court it did not offer this evidence to prove the state of mind of Leonard, the basis upon which it now claims its admissibility, but upon a wholly different theory, viz., that Leonard was an agent of appellants for the purpose of transmitting to Nesseth the contents of the telephone conversations purportedly made by Carbo to Leonard, and that Nesseth's testimony corroborated Leonard's testimony as to what Carbo had said to Leonard.

For example, in a discussion in the trial court relative to the admissibility of this testimony, the prosecutor said:

"Basically the theory of the Government in this case, your Honor, is that the defendants were using Jackie Leonard as a contact man and an instrument for putting pressure upon Don Nesseth, in order to get control of Nesseth's fighter, Don Jordan.

" * * *

"So we have to bring out through Nesseth what Leonard had told him.

" * * *

"I would say there is an agency theory here to

some extent. They are using Leonard as their agent. " (RT 1765).

And again in the prosecution's Memorandum of Points and Authorities filed in connection with the Motions for New Trial, we find the following statement (CT 1459):

"There is dramatic corroboration of Leonard's testimony concerning the telephone threats from Carbo. " (Emphasis ours).

Then follows a description of the April 28, 1959 occurrence when Carbo purportedly threatened Leonard on the telephone (CT 1459).

And in the same document is the following statement by the prosecution:

"Further corroboration of this Carbo telephonic threat stems from the fact that Leonard testified that within a few minutes of talking to Carbo the phone rang again and this time Palermo was on the line trying to calm Leonard down, *** Nesselth corroborates the fact that the second call was received and that Leonard said it was from Palermo. . . . " (CT 1460; Emphasis ours).

We believe it is unnecessary to cite authority supporting the fundamental rule that when the prosecution has offered evidence in the trial court upon a certain theory, and such evidence has been received by the court and considered by the jury upon that

theory, the introduction and reception of that evidence cannot be supported on appeal upon a different theory.

(c) The next assertion made by the prosecution in connection with this point is that the testimony of Nesseth and McCoy was "proper corroboration of Leonard's testimony" (Appellee's Br. p. 250); that "Nesseth and McCoy were called to corroborate the essential framework of Leonard's story" (Appellee's Br. p. 251); and, finally, "as circumstantial corroboration" of Leonard's testimony on the witness stand, "Leonard's statements to Nesseth and McCoy were clearly admissible as prior consistent statements of a witness made prior to a time when he had a motive to fabricate" (Appellee's Br. p. 251; Emphasis added).

Once again, the prosecution refers to principles of law about which there can be no question. And once again the prosecution fails to show their applicability to the point in issue; in fact, the prosecution's argument in this respect demonstrates clearly the inapplicability of those rules of law.

Generally speaking a witness can not be rehabilitated by proof of prior consistent statements -- such proof is of no probative value.

"... A prior consistent statement by a witness adds nothing to the probative value of his testimony at the trial. 2 Wigmore, Evidence §1125 (3d ed. 1940). If McLaughlin told the truth at the trial he may very well have told it December 11. If he lied at the trial

his statement of December 11 only shows that he lied consistently. "

United States v. Toner, 173 F.2d 140, 143.

However, there seems to be a contrariety of opinion on this question among the courts, as indicated by the discussion in McCormick on Evidence (1954) Ch. 5, Par. 49:

"There is much division of opinion on the question whether impeachment by inconsistent statements opens the door to support by proving consistent statements. A few courts hold generally that it does. (Citations). Most courts, since the inconsistency remains despite all consistent statements, hold generally that it does not. (Citations) . . . "

Then McCormick discusses the exception to the rule, upon which exception "all courts agree":

" . . . But certain exceptions should be recognized. * * * If in the particular situation, the attack by inconsistent statement is accompanied by, or interpretable as, a charge of a plan or contrivance to give false testimony, then proof of a prior consistent statement before the plan or contrivance was formed, tends strongly to disprove that the testimony was the result of contrivance. Here all courts agree. " (Emphasis in original).

In discussing the question of prior consistent statements, this Court, in Lindsey v. United States (1956), 237 F.2d 893, 895, used the following language:

"Appellee urges that notwithstanding the majority view which holds such evidence inadmissible, 140 A.L.R. , supra, at 22, the better rule and, in the absence of applicable federal statute or Alaska precedent to the contrary, the correct rule -- the rule adopted by the trial judge to insure fair trial in the case at bar -- is that prior consistent statements are admissible to rehabilitate a witness who has been impeached by prior contradictory statements.

"There is scant basis in reason or experience to admit such statements, except in cases where it affirmatively appears that the prior consistent statement was made at a time when the declarant had no motive to fabricate. Only then can such evidence be considered as having any reliable element of trustworthiness. (Citing cases). "

We agree with the prosecution that not only was an attempt made by appellants to discredit Leonard and his testimony, but that attempt was eminently successful (see argument under Points VIII and IX, App.Op.Br. pp. 72-77, and App.Op.Br. , Appendix "B").

There can be no question in this case that the witness

Leonard was discredited. As we pointed out in our opening brief, Leonard had been discredited by all of the recognized methods of impeachment excepting conviction of a felony, and the evidence disclosed a flagrant effort by Leonard and his wife to obstruct justice, an attempt to commit extortion, and the solicitation of a bribe in the sum of \$25,000.00 from one of the appellants in consideration of Leonard's leaving the country and not testifying as a witness in the trial of this case (Carbo Op.Br. p. 43). Leonard was the main witness for the prosecution; it was he who gave the principal evidence against Carbo with reference to the purported threatening telephone calls allegedly received by Leonard from Carbo. And now we find the prosecution contending that the hearsay declarations of this thoroughly discredited witness can be used -- not to show that he had no motive to fabricate, but that they bolstered and "corroborated" his testimony from the witness stand.

However, proof that Leonard had made prior statements consistent with the story he told on the witness stand could not be used, as the prosecution now asserts, for the purpose of "corroborating" that story; their use is confined to determining whether or not the witness is telling the truth on the witness stand; in other words, the jury can give that evidence such weight as it might be entitled to receive on the question of the witness' credibility, but such statements can not be used as substantive evidence that the contents of the statements are true. This rule is fundamental and needs no citation of authority to support it.

However, once more the prosecution finds itself in a dilemma, since, as we have demonstrated above, the prosecution offered this evidence upon the theory that Leonard was an "agent" of the appellants, and it was received by the Court upon that theory; and at no time in the trial court did the prosecution assert that it was relying upon the theory of "prior consistent statements". Under these circumstances, as we have pointed out above, the prosecution can not now, upon appeal, ask this Court to consider this evidence upon a totally different theory from that under which it was offered and received in the trial court.

D. Evidence of Anonymous Telephone
Threats to Leonard (Reply to Appellee's
Point VI, B, 6(a), pp. 252-254).

"State of mind" (Appellee's Br. p. 253) is a comfortable umbrella under which to rest when seeking to find justification for the reception of irrelevant, to say nothing of highly prejudicial and never connected-up, evidence. But in this instance the shade is not broad enough. 21/

The following occurred on the direct examination of Leonard, as a part of the Government's case in chief (RT 765-766):

"Q. All right. When was the next contact you

21/ Bracey v. United States, 142 F.2d 85, 89-90 (CA DC 1944), cert. den. 322 U.S. 762, relied upon by appellee is not apposite. That case involved the question of evidence on rebuttal of similar conduct by the defendant charged. That has nothing to do with the factual situation we are now considering.

had with Mr. Palermo?

"A. The next one I believe was in the end of October or first of November, I had a message to call him.

"Q. From whom did you receive that message?

"A. From my wife.

"Q. And did you telephone Mr. Palermo?

"A. Yes.

"Q. And did you have a conversation with him?
Just answer yes or no.

"A. Yes.

"Q. Have you received any sum of money from Mr. Palermo since May 20, 1959?

"A. No, sir.

"Q. Did you ever authorize anyone to contact Mr. Palermo in your behalf?

"A. No, sir.

"Q. Did you authorize your wife to contact Mr. Palermo?

"A. No, sir."

On cross-examination recordings were played of two telephone conversations between Leonard and Palermo, which Leonard stated accurately depicted the conversations (RT 1653, 1655) and which showed that Leonard had not told the truth on his direct examination quoted above. (Appx. B, attached hereto). Then on redirect examination of Leonard ensued the matter set

out in Carbo's Opening Brief pages 19-21 under Specification of Error 8.

We submit that the evidence admitted -- that Leonard was frightened by the telephone calls (RT 1663) -- was utterly irrelevant. State of mind had nothing to do with Leonard's testimony on direct examination that he did not authorize his wife to contact Palermo. (RT 766) That the evidence was highly prejudicial cannot be gainsaid. It can only serve to have had the jury believe that these defendants or some of them had made telephone calls between May 20 and November, 1959, which frightened Leonard. There was no evidence to this effect. Prosecution counsel himself said that he could "not ... show these defendants made these threats" (RT 1661). The evidence was completely improper.

Moreover, whether Government counsel calls it "state of mind" or not, the effect of this evidence is to suggest to the jury that it may be considered (and the court gave no limiting instruction) in connection with proof of the offenses charged in the Indictment; i. e. if defendants were trying to keep a prosecution witness from testifying, they must be guilty as charged and this long after the alleged conspiracy was ended. This is no more proper than is evidence of attempts to conceal the conspiracy after the conspiracy is ended. (Grunewald v. United States, 353 U.S. 391) This "attempt() to broaden the already pervasive and widesweeping nets of conspiracy prosecutions" will not be permitted. (ibid at p. 404)

The damage inflicted upon appellants was irreparable.

E. Other Irrelevant and Prejudicial
Evidence (Reply to Appellee's
Point VI, B, 7)

Appellee states (Br. 258) that "Carbo presents a potpourri of items which he says should not have been received against him, claiming these items were irrelevant and prejudicial". If the writer of the appellee's brief is referring to the collateral and irrelevant evidence introduced against appellant and which we set forth in f. n. 9 on pages 77-79 of our Opening Brief, he speaketh well, since that evidence is a shining example of the dictionary definition of "potpourri", viz, "a confused or heterogeneous mixture * * or hodgepodge".

Carmen Basilio

Appellee says (Br. 262) this evidence that Basilio saw appellant in a house in Miami between January 1 and January 14, 1959 corroborates Leonard's testimony that he saw Carbo in the Chateau Resort Motel in Miami on January 6, 1959. To reach the conclusion stated by appellee one would have to draw at least two inferences, one predicated upon the other, neither of which inferences would be reasonable, viz (1) that because Carbo was in Miami between January 1 and January 14, 1959, therefore he must have been in Miami on January 6, 1959; (2) that because he was seen in a "house" in Miami between January 1 and January 14, 1959, therefore, he must have been in the Chateau Resort Motel on January 6, 1959. To suggest that Leonard can thus be

corroborated is stretching the inference rule to absurdity.

Next appellee suggests (Br. 262) that Basilio's testimony showed a similar act of Carbo's in arranging meetings so that the other party would not know he was about to be confronted by Carbo. This certainly is no proof that Leonard saw Carbo in Miami. There is no evidence that Carbo made the call for De John to go over to Norris' house, and Basilio's testimony is that it was De John who suggested to him that they take a ride, and nothing was said about going to Norris' house. (RT 2835-6) But, even assuming that Carbo had arranged meetings so that, as appellee contends (Br. 262) "the other party wouldn't know he was about to be confronted by Carbo," that certainly would be no evidence tending to show that Carbo had attempted to extort money from Leonard or had entered into a conspiracy for such purpose.

Appellee speaks (Br. 263) of Carbo's exercising de facto though not de jure management control over the welterweight champion who was ousted from the championship by Don Jordan, and that such evidence was circumstantial evidence of Carbo's ability to tell Leonard through Palermo that "We are in for half the fighter of there won't be any fight." Appellee suggests (ibid) that (1) the fact that Akins' manager, Bernard Glickman, saw fit to discuss Akins with Carbo in 1957 and early 1958, was evidence of such de facto control. The record discloses that when Glickman was asked about those discussions and if they "involved the fight career of Mr. Akins" Glickman replied that

they did not, and when asked what they were talking about, Glickman replied "Mr. Carbo was a very good Dodger fan. He liked to talk about baseball too." (29 RT 4259--60) But, even had Carbo discussed Akins with Glickman, that would not show, without more, that Carbo had a de facto control over Akins. We take it that the record shows that Leonard and Nesseth had conversations with Glickman about Akins; according to appellee's argument, this would mean that they had a de facto control of Akins.

We suggest that appellee is hard pressed when it makes the contention (br. 263) that Glickman's \$10,000 loan to Carbo, "without any evidence to protect him" was additional "circumstantial corroboration" of Carbo's control of Glickman. Of course, it is common knowledge that loans are made without collateral or without evidence of the indebtedness, and it is also common knowledge that such loans are paid. In this instance, the evidence shows that the \$10,000 loan was repaid by Carbo (29 R. T. 4283) a fact to which the appellee failed to call this Court's attention. There is no evidence that the loan had anything to do with Glickman's boxing business or with his management of the fighter, Akins, and one would indeed have to indulge in fantasy to draw from the evidence in question here the inference that Carbo had a de facto control of the fighter, Akins.

Appellee again gives "wings to its imagination" when it suggests (Br. 263) that "More corroboration of Leonard" was supplied by Glickman's testimony that the \$10,000 in currency

was picked up from him by a messenger who identified himself as "Mike"; that Abe Sands was identified to Leonard as "Mike" when he met Leonard at the Miami airport. The Leonard incident was in Miami in January, 1959; the loan transaction was in Chicago in 1957. There is nothing in the evidence to indicate that the person to whom the money was given in 1957 in Chicago was the same person who was supposed to have met Leonard in Miami in January, 1959, other than the fact that each was called "Mike". A pretty flimsy bit of evidence upon which to rely for the purpose of corroborating the testimony of a thoroughly discredited witness such as Leonard.

Marrone's Testimony

In referring to the testimony of the witness Marrone to the effect that he saw Carbo in a house in New Jersey and that Palermo's brother-in-law was there at the same time, and that the latter had in his possession a facsimile of the Western Union money order for \$1,000 which had been sent to Leonard by Palermo in Daly's name, appellee argues that (Br. 263-264) it established that Carbo was in the Philadelphia vicinity, a month after the April 28th telephone calls purportedly made from Palermo's residence in Philadelphia; and that De John provided further corroboration of this fact when he testified he saw Carbo and Palermo together in an unidentified private house in Philadelphia in April or May, 1959.

Let us analyze this contention and the basis therefor.

The telephone calls were purportedly made in Philadelphia on April 28th and from a specific telephone located in Philadelphia -- not anywhere else. (Exhs. 21, 22) The incident to which Marrone testified occurred took place not in Philadelphia, not even in Pennsylvania, but in the town of Audubon (RT 6499) which is in another and different state, New Jersey (ibid); and took place not on April 28th, nor even approximately near that date, nor even in the month of April, but in the month of May and the latter part thereof, the 29th or 30th, (RT 6499) more than a month after the purported telephone calls of April 28th. In short, appellee is saying that one can infer from the fact that Carbo was in New Jersey on May 30th, that he was in Philadelphia (in another state) over a month prior thereto, and thus could have made the purported telephone calls. We suggest that absurdity could go to no greater lengths.

We have a similar situation with reference to appellee's suggestion (Br. 264) that the witness "De John provided further corroboration" of the fact that Carbo was in the Philadelphia vicinity on April 28th when he testified that he saw Carbo and Palermo in a house in Philadelphia in April or May, 1959. (De John's actual testimony was: "Well, I was in Philadelphia, but I am not very sure if it was April or May, see." (RT 6577)) Here, we have the locale the same, that is, Philadelphia, but we find ourselves a little short on time. In Marrone's testimony, at least, the time was fixed on May 30th, even be it a month after the occurrence which is the subject of the proof here, but with

De John, the testimony that it was "April or May" when he saw Carbo was of no value whatsoever -- it was neither fish, fowl nor good red-herring in so far as its being used as proof of Carbo's presence in Philadelphia on April 28th. We must qualify that last statement, however, and suggest that the prosecution found it to be a "good red-herring" for the purpose of diverting attention from the true facts.

In connection with this Marrone testimony appellee argues (Br. 2621) that "it provided circumstantial corroboration of the fact that Carbo and Palermo's plans to extort money from Jordan's managers initially included an attempt to win Leonard's confidence by sending him a \$1,000 Western Union money order which enabled him to come to the Miami meeting."

Appellee's reasoning - if it can be termed that - on this subject, seems to be that Cori was a brother-in-law of Palermo's; that he was in the house with Carbo on May 30th; that he had in his possession a copy of the Western Union money order which had been sent by Palermo to Leonard in Daly's name some six months before; that therefore, this showed that Carbo and Palermo had attempted to win Leonard's confidence by sending him a \$1,000 Western Union money order in Daly's name. All of this could be designated as plain and simple gobbledegook, if we may be permitted the use of an expressive term. Palermo was not present on May 30th; there is no showing that Carbo had anything to do with the Western Union money order; the fact that Cori had a copy in his possession is no proof whatsoever

that Palermo had sent it, nor any proof that Carbo had anything to do with its sending and no proof that he knew it had been sent. No connection was shown between Carbo and Cori, other than the fact that they were there together. All we have are two isolated facts, in no way related to each other: (1) the presence of Carbo and Cori in the same house; and (2) the possession of the copy of the Western Union money order by Cori, which facts considered singly, or together, could in no way lend support to the prosecution's contention that there was a plan by Carbo and Palermo to extort money from Jordan's managers and that it included an attempt to win Leonard's confidence by sending him a \$1,000 Western Union money order.

The Incident at Goldie Ahearn's Restaurant on March 19, 1958

The prosecution contends (Br. 264) that the witness Bernhard's testimony relative to this incident

1. Was another excellent example of common scheme and plan;
2. Was additional evidence of Carbo's control of Akins' manager, Glickman; and
3. Was circumstantial corroboration of the fact that Palermo and Sica were knowing co-conspirators with Carbo, as well as another employee of the IBC, Billy Brown.

We will discuss the three phases of this contention seriatim -

1. Appellee does not provide us with any information

as to the "common scheme and plan" of which, so he says, this was another excellent example. We assume that the prosecution intends to convey the idea that there was a scheme or plan upon the part of the appellants here to extort money from Leonard, and that this evidence proves that there was such a scheme or plan. In other words, what the prosecution is saying is that this evidence shows an attempt by Palermo and Carbo to extort money from Viscusi. Of course, there are several answers to that: There is no testimony as to any "demand" (Appellee Br. 265) made by the speaker. Palermo said (RT 6520) "I told him we needed two grand right away and to send it up." There was no threat of any kind made by Palermo or Carbo, and we know nothing of what the party on the other end (presumably, Viscussi) said. There was nothing to show that there was any specific intent upon the part of Palermo or Carbo to extort any money from Viscusi. It is obvious that the whole matter was considered as a joke, since the testimony is that the group at the table laughed at Palermo's recital of his conversation. (RT 6521)

Bernhard was an officer with the New York Police Department and was present at the restaurant that night in the course of his official duties. (RT 6511-12) Had he believed that this was a bona-fide attempt to extort money from Viscusi, it seems to us he would have taken immediate action to see that the law was enforced and a prosecution had for the commission of a criminal offense. Of course, as the record will show, the prosecution did not produce Viscusi, the purported victim, as a witness to testify

as to this "attempted extortion."

2. We take it that the prosecution intends to assert that Bernhard's testimony as to Palermo's conversations with Viscusi was "additional evidence" (Appellee Br. 264) of Carbo's control of Akins' manager, Glickman. "Additional" presupposes that there is something already in the record to show that. This, we submit is not so, nor has the prosecution been able to point out anything to support that contention. In connection with this particular testimony, first, it does not show that Palermo asked for any money at the request of Carbo; and second, if it did, the fact that Carbo asked Viscusi to send him some money, that he needed it, would certainly be no evidence that he had control of Viscusi or Viscusi's fighter, Joe Brown, and less evidence that he had control of Akins' manager, Bernard Glickman, who was not involved in the matter in any way whatsoever.

3. Appellee asserts (Br. 264) this evidence was "circumstantial corroboration" of Palermo's and Sica's being known co-conspirators with Carbo, as well as another employee of the IBC, Billy Brown. Billy Brown gets into this conspiracy because he happened to be seated with Palermo and Sica in Goldie Ahern's restaurant; together with a number of other people, watching a prize fight on TV (RT 6521, 6528), and, according to appellee, was present when Palermo related his purported conversation with Viscusi, and according to the prose-

cution that shows that Carbo had control of Brown, who was the manager of the lightweight champion, Joe Brown.

And now we drag Sica in by the heels to show that he, as well as Brown, was a known co-conspirator, in assisting Carbo to control Billy Brown and his fighter, Joe Brown, the lightweight champion. Sica told Livingston, according to the record (RT 2331) as cited by appellee (Br. 265), the manager of the lightweight contender, Johnny Gonsalves, that he would try to arrange a title fight between Gonsalves and Brown for the title. The appellee does not, however, call this Court's attention to the fact that it was Livingston who wanted Sica to arrange the fight for him -- Sica was not seeking out Livingston and offering to get a title fight for Leonard's fighter. Livingston's testimony on this subject is as follows on redirect examination by the prosecutor (RT 2330-2331):

"Q. Mr. Livingston, will you please tell us in your own words and to the best of your recollection the substance of the conversation between yourself and Mr. Sica?

"A. Well, I was asked -- I wanted to get Johnny a title bout. He had been No. 1 contender for a long time and he needed a title fight if he ever wanted to get anywhere.

"Q. You say 'for a long time'. What do you mean?

"A. Well, Johnny has been fighting 17 years. He has been fighting pro 13 years, and he was No. 1

contender for five or six of those years. He beat three world's champions before they became champions and he had never got a shot at the title. A lot of people consider him a bad fighter, but you just don't beat fighters like that and become a bad fighter. And if they say that he looks bad on TV, I have seen a lot worse on TV.

"But, besides that, the only way you can get a title fight, which almost anybody knows, --

"Q. Well, --

"A. O. K.

"Q. -- just tell us what the conversation was with Mr. Sica.

"A. Well, we -- I -- we asked Mr. Sica if he could arrange a title fight for John. He was doing us a favor. He said he would have to go to Miami to try to arrange it and it would cost a thousand dollars expense money and he would see what he could do and we would have to give up 15 points off the fighter.

"Q. What is 15 points?

"A. 15 per cent of the fighter.

"Q. To whom?

"A. I don't know. He didn't mention no names.

But that is the only way you get a title fight."

The testimony is not, as the appellee states (Br. 265), that

the 15% of the fighter was to go to an "unidentified person located

in Miami". Sica said he would have to go to Miami to try to arrange it -- he did not say that the 15% would go to someone "located in Miami" -- and even if he had stated that, the fact that Leonard says he saw Carbo apparently residing in an apartment in Miami would be no proof that the so-called unidentified person who was to receive the 15% was Carbo. (The testimony as to the apartment [RT 645] does not reflect that Carbo was "apparently" or otherwise residing there; and it seems passing strange that the prosecution which throughout the trial and throughout its brief on appeal here forcefully intimated that Carbo had no residence and no roots, now finds itself conceding -- for its own purposes, of course -- that Carbo was residing in an apartment in Miami.)

And now we arrive at the perfect non-sequitur.

1. Since Brown's manager lived in Houston; and
2. Sica said arrangements for a fight between Gonsalves and Brown's fighter, the lightweight champion, had to be made in Miami (the testimony was that Sica said he would have to go to Miami to try to arrange it [RT 2331]); and
3. Since the price of a chance to fight for the title was the same 15% that was demanded by Carbo and Palermo from Jordan's purses (Appellee's transcript reference [Br. 265; RT 2331] says nothing about any demand by Carbo -- and when appellee speaks of the "same"

15% we assume that he means, not that it was the identical 15%, but that the percentages were the same).

Therefore, says the appellee (Br. 265), "it seems clear that Sica was acting as Carbo's shakedown emissary in loco Palermo." If that conclusion seems "clear" to appellee it is either viewing this evidence with rose-colored glasses, is suffering from myopia, astigmatism and kindred diseases of the eye, or is completely lost in a world of fantasy which it has created out of a vivid imagination.

The fact that Brown's manager lived in Houston does not mean that he remains there at all times, particularly when he is managing the lightweight champion and other fighters, whose activities are certainly not confined to Houston.

Because Sica said he had to go to Miami to make arrangements for the fight, does not mean that he was dealing with Carbo; and there is no evidence that Carbo was to be or was in Miami at that time. Carbo's name does not enter the picture in any way whatsoever in the conversation Sica had with Livingston when the latter was seeking Sica's aid.

And even assuming for the purpose of discussion this point, that Carbo and Palermo had demanded 15% from Leonard for Jordan's title fight with Akins, what connection could there possibly be between that fact and the fact that Sica said that Livingston would have to pay 15% in order to obtain a title fight for his fighter?

In other words, if anyone endeavored to arrange a title fight between Gonsalves and the lightweight champion Joe Brown, on the understanding that Livingston, the manager of the challenger, would give up 15% of the fighter, the mere fact that the percentage was the same as that purportedly demanded of Leonard for the Jordan-Akins fight, would make that person a conspirator with Carbo and Palermo and would show that that person was acting as "Carbo's shakedown emissary in loco Palermo." The mere statement of that argument discloses its own refutation.

More irrelevance is disclosed by Appellee's reference (Br. 265) to the witness Bernhard's overhearing of a conversation between Carbo and Palermo about a dinner which Palermo wanted to attend. Carbo told Palermo he would be able to attend it. Evidently, according to the record (RT 6526), Palermo was at the dinner; whether through Carbo's aid or otherwise is not disclosed; but what is the difference? What does all that prove in so far as any issue in this case is concerned? According to the record, the dinner was given by the Chicago Boxing Writers and Broadcasters Association (RT 6545). Men of standing and importance in the boxing world and in the sports division of leading newspapers were present, including (RT 6545-6550) James Norris, President of the I. B. C., Monsignor Kelly, Director General of the Catholic Youth Organization, the Mayor of Chicago, Frank Gilmer, chairman of the Illinois State Athletic Commission, representing the Governor of the State, the boxing

champions in various divisions, including, Ray Robinson and Carmen Basilio, Truman Gibson, Jr., one of the appellants in this case, and many others. Tickets were at a premium (RT 6550). So Palermo, who has been in the boxing business for years and has managed champions, is present at a dinner attended by the aforementioned person. Under the prosecution's reasoning, some of these persons should be charged with these conspiracies, since they were present on that occasion at the same dinner at which Gibson and Palermo were guests. There would be just as much basis for that as there is for making Sica an emissary of Carbo's in connection with the Livingston-Gonsalves incident.

Finally, we have Bernhard's testimony about overhearing Carbo tell the group at the table:

" ... 'I have troubles -- I got this trouble straightened out. Now I got more trouble. I got his contract. He is my fighter. I spoke to Glickman about it so don't worry.' " (43 R. T. 6525)

Appellee says (Br. 266) that this remark was made two days before Akins fought Logart in an elimination bout for the selection of a new welterweight champion. Appellee does not say so, but we take it that there was some connection between the remarks and the fact that Akins fought Logart. We suppose the appellee interprets the statement (RT 6525) "I got his contract. He is my fighter." as referring to Glickman's fighter Akins, but there is nothing in the statement to indicate that; and the fact

that those remarks were prefaced by the statement (ibid) "Now I got more trouble." would certainly indicate that it was not Akins who was the subject of the conversation, since, according to the prosecution Akins was controlled by Carbo, and that, if true, would mean not trouble for Carbo, but money.

Appellee also asks (Br. 266) us to note, with interest, that when Akins defeated Logart in the fight just mentioned, he then faced another Carbo-controlled fighter in the final elimination bout for the title: Vince Martinez, who was managed by Daly. The transcript references used by appellee in this connection (13 RT 1937; 21 RT 3064) do not support appellee's bald statement that Vince Martinez was a "Carbo-controlled" fighter. There is nothing in the testimony referred to by the appellee to warrant his making such a misleading and unwarranted statement to this Court; nor is there any support for such a statement in any other part of this record - had there been, appellee would surely have called attention to it.

With reference to the Weill incident about which appellant complains (Carbo Op. Br. 78), appellee's reply is (Br. 258) that the entire transaction was injected into the case by appellant and not by the prosecution. Here again appellee is in error.

Appellee says (Br. 258) that Carbo's counsel "suggested to Leonard that Leonard made an offer to Carbo to give Carbo half of all his fighters if Carbo would allow the lightweight champion, Joe Brown, to fight an unidentified opponent." (Emphasis added). Once more, appellee indulges in a distortion of the facts, and a misstatement

of the record. There was nothing in that conversation to the effect that Carbo would "allow" Joe Brown to fight, nor was there anything there indicating that the opponent was unidentified; on the contrary, Jordan was specifically identified as the opponent (RT 1456-7).

This is what actually happened: Appellant's counsel asked Leonard if at that time he did not tell Carbo that he would give him half of all of his (Leonard's) fighters if Carbo could get Jordan a fight with the champion Joe Brown (RT 1456-7). Leonard denied making that statement (RT 1457). Nothing was asked of Leonard concerning any purported conversations between Carbo, Weill and Leonard. But on redirect examination, the prosecution was permitted, over appellant's objection (RT 1671a-1672), to introduce the collateral and irrelevant matter which forms the basis of appellant's claim of prejudicial error. The claim by Leonard was that (RT 1671a) he had been put "on trial" by Carbo and had been told by Carbo that he should use Gambina's fighter and Weill's fighters if he, Leonard, "expected to use any big name fighters out there" (RT 1672). This testimony was plainly prejudicially irrelevant; it was not related to nor based upon anything to which Leonard had testified on his cross-examination. As we have pointed out, the only question asked of Leonard on his cross-examination was whether he had told Carbo he would give Carbo half of his fighters if Carbo could get Jordan a fight with the champion, Joe Brown, which Leonard denied (RT 1456-7). Appellant, upon Leonard's denial, could, if

he so desired, adduce testimony to refute that denial; but, under no rule of law of which we are cognizant, could the prosecution on redirect examination, properly introduce such testimony as was permitted to be received in evidence here. (Ballew v. United States, 160 U.S. 187, 192-193; United States v. Corrigan, 168 Fed. 2d 641, 645 [CCA 2, 1948]; Gordon v. Robinson, 210 Fed. 2d 192, 195 [CA 3, 1954]).

The Weill incident occurred in March, 1958. The prosecution does not contend that the conspiracies charged here were in existence at that time, nor at any time before the time charged in the indictment. Now appellee says (Br. 261) that appellants Gibson and Carbo "had confederated on occasions prior to the time that Jordan became the top welterweight contender, when Carbo desired to apply pressure to Leonard." (emphasis added) In other words, appellee seeks to prove other conspiracies. This it is not permitted to do (Kotteakos v. United States, 328 U.S. 750, 758, 769). Additionally, if such an incident as described by Leonard had taken place on March 15, 1958, it could not have been proof of any conspiracy between Carbo and Gibson, since Carbo is the only one who was supposed to have made the statements to Leonard; and the only connection Gibson is supposed to have had with the transaction is that he was asked by Leonard where he could locate Carbo. (RT 1670).

Appellee's reliance (Br. 261-2) upon Judge Hand and United States v. Dennis, 183 Fed. 2d 201, 231 is misplaced. What Judge Hand was referring to in the quotation cited by appellee was

declarations made in connection with the same conspiracy. As we have pointed out, appellee is not claiming that the Weill incident was part of the conspiracies charged in the indictment; appellee contends it was evidence of a separate conspiracy between Carbo and Gibson (Appellee's Br. p. 261).

If it be contended that this conversation shows a similar offense, our answer is that it is obvious that there is no similarity between the Weill incident and the charges of conspiracy to extort, attempted extortion, and extortion which form the bases of the indictment in this case. While it is true that there are exceptions to the general rule that evidence of a separate and distinct offense is not admissible in proof of the one charged, the general tests of the admissibility of evidence under such exceptions are: 1. Is it part of the *res gestae*? 2. If not, does it tend logically, naturally, and by reasonable inference to establish any fact material for the prosecution, or to overcome any material matters sought to be proved by the defense, or does it help to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme (20 Am. Jur. §310, et seq., p. 289, et seq., 22 CJS, §683, et seq., p. 1089, et seq.; Wigmore on Evidence, Vol. II, Ch. VII, p. 191, et seq.).

This rule is not an open sesame to evidence of other alleged offenses by the defendant in a criminal trial. On the contrary, our Courts have emphasized that the direct relevance of the evidence to facts material to the crime charged must be clearly apparent before it will be admissible. Otherwise, it must

be excluded, since it is highly prejudicial. Indeed, in cases of doubt as to relevancy, the doubt must be resolved in favor of the accused, and the evidence excluded. (Ibid)

Applying these rules to the question at issue here, it is clear that the Weill incident could not assist in proving motive, premeditation, guilty knowledge or malice, since none of those matters was in issue here; and that testimony certainly would throw no light upon the specific intent which is necessary in the crimes of conspiracy to extort and extortion, the offenses charged in the indictment. A comparison of the evidence adduced in connection with the Weill incident with the evidence received in connection with the conspiracy and extortion charges found in the indictment, makes this crystal clear. And the same comparison will show that there is no showing of a common plan or scheme which would warrant the introduction of the testimony of which we complain. The Carbo statement to Leonard in March, 1958 that he should use Weill's fighters is not an "extortive demand" upon Leonard, as appellee describes it (Br. 260); there was no element of extortion in Carbo's conversation with Leonard at that time, and nothing remotely indicating that Carbo was seeking to control any of Leonard's fighters, as is the prosecution's contention with reference to the charges in the case at bar.

The testimony of which appellant complains was not part of the *res gestae*, nor did it tend logically, naturally, and by reasonable inference to establish any fact material for the

prosecution, or to overcome any material matter sought to be proved by the defense. It should not have been received; that its admission was prejudicial to appellant is manifest.

It might not be amiss here to point out that the thrust of appellee's argument here is an attempt to uphold its position and that of the trial court, by citing the most general of principles without attempting to reckon with the actual facts of this case. We submit that cases on appeal are not to be subjected to such a process of truncation so that they may fit only a limited number of standard procrustean beds formed by the prosecution. The incantation of general rules of law does not prove that error has not been committed or that appellant has had a fair trial.

V

THE MOTION TO DISMISS COUNTS VII AND IX BASED ON FAILURE TO ALLEGE VENUE THEREIN SHOULD HAVE BEEN GRANTED (Reply to Appellee's Point VI, A, 3(b); pp. 171-177)

We do not understand appellee's argument (Br. 174-175) about waiver. Appellant did not waive his venue point, he moved to dismiss before trial (CT 426, 159, 164).

Nor do we understand appellee's apparent argument (Br. 171-172) that because the method of raising a defective allegation as to venue, before the change in the Federal Rules of Criminal Procedure, was by way of demurrer, therefore decisions before

the change holding an indictment bad for failure to allege venue are not applicable now. 22/ That an indictment which improperly alleges venue is subject to a motion to dismiss cannot, we submit, be gainsaid. Rule 12(b) specifically provides that defects which were formerly reached by demurrer are now to be raised by motion to dismiss. And Blackmar v. Guerre, 342 U.S. 512, 514, specifically holds that a complaint which improperly alleges venue is subject to a motion to dismiss. Though Blackmar is a civil case, the Federal Rules of Civil Procedure (Rules 7[c], 8[a] and 12[b] and [h]) are to this extent - simplified statement of claim, abolition of demurrer, defenses to be presented by motion, defenses waived if not raised -- the same. For a criminal case, after the adoption of the Federal Criminal Rule, granting a motion to dismiss for failure to properly allege venue, see United States v. Richman, 190 F.Supp. 889 (D. Conn. 1961).

We believe the District Court decision in United States v. Weishaupt, 167 F.Supp. 211 (ED NY 1958), relied upon by appellee (Br. 173) was erroneously decided. Significantly, the court cites no case in support of its ruling, and the case is directly contrary to what the Supreme Court said in Knewel v. Egan, 268 U.S. 442, 446, a habeas corpus case cited by appellant. (Carbo Op. Br. 66) and not commented upon by appellee.

It is a startling innovation in the law, we submit, in the light of the Sixth Amendment, to say, as the appellee indeed does,

22/ Incidentally, appellee fails to note the cases cited in Bratton v. United States, 73 F.2d 795, 798, upon which Bratton relied.

that an Indictment need not allege venue. What might have ensued, had the trial court granted the motion to dismiss, as it should have, whether the Government would have amended, whether Counts VII or IX should have been transferred to another district for trial, etc., is beside the point here.

Appellee argues that an indictment which fails to allege venue (and it is not to be forgotten that each count in an indictment is treated as, and is, a separate indictment [Murphy v. United States, 133 Fed.2d 622, 627 (CA 6 1943)]) is a proper indictment. We submit this is not so. We submit that an indictment is defective which fails to allege venue, that such an indictment is subject to a motion to dismiss and that the district court's failure to grant the motion will be reversed on appeal. (Knewel v. Egan, 268 U. S. 442, 446).

VI

THE CONDUCT OF THE TRIAL

In addition to other things which occurred at the trial (e. g. Points IV, C, D, and E, supra), the Court's and the Prosecuting Attorney's conduct denied appellant a fair trial.

A. The Questioning of Carbo's Counsel
During Summation (Reply to Appellee's
Point VI, B, 12, (d), pg. 303)

Appellee's argument under this point overlooks the record and misses the point of appellant's complaint.

In the first place, appellee overlooks the fact that the trial court had ordered the attorneys not to interrupt another attorney's argument even though they thought he was "misquoting the evidence" (RT 6816). Accordingly, when the court violated its own rule (we would suppose the purpose of his ruling was, as stated (ibid), so there would be no interruption and when it came time for argument the error would be pointed out), it immediately conveyed to the jury that counsel was misquoting the evidence.

Secondly, the very question asked by the court, more than suggests, it frankly states, that counsel was misquoting the evidence. ("Mr. Beirne, what evidence is there in the record that he lived in Miami, Florida and made his home there for ten years?" [RT 7283]).

But the most important and damaging part of this colloquy, if we are going to afford defendants the right to a jury trial, is that after Carbo's counsel replied that defendant Palermo so testified (ibid), the Court's reply (ibid), "You are drawing on the testimony of Palermo?" is tantamount to an instruction that such testimony was not to be believed. We can conceive of few things more incorrect or prejudicial.

And appellee, in its quotation of some of Palermo's

testimony following its statement (Br. 303) that "the trial court was quite charitable," is even now implying, if not actually saying that Carbo's counsel was indeed misquoting the evidence. Appellee is mistaken. The record shows that Palermo testified (RT 6209):

"Q. Do you recall watching that fight on television and being in the same room with Mr. Carbo and Gabe Genovese?

"A. I don't remember because Carbo lived in Miami. I have seen Carbo quite a few times.

"Q. Where did he live in Miami, sir?

"A. I was never to his home. He lived -- I know he lived in Miami for the last ten years."

Appellant was entitled to be tried before a jury that was permitted to make up its own mind.

B. The Appellant was Denied a Fair Trial (and, Hence Deprived of Liberty Without Due Process of Law in Violation of the Fifth Amendment) Because the Prosecution "Allowed False Evidence to go Uncorrected" 23/ (Reply to Appellee's Point VI, B, 12(c); pg. 302).

1. The following testimony of Leonard, with respect to his attempt to secure \$25,000 from the defendant Palermo, in return for his not being a witness in this case against the

23/ The phrase is from Napue v. Illinois, 360 U.S. 264 at p. 269 (See Appellant Carbo's Opening Brief, p. 44).

defendants, 24/ was false: 25/

a) Leonard's testimony, elicited by the prosecution, on direct examination of Leonard, as a government witness, that he had never authorized his wife (Jeanne) to contact the defendant Palermo in Philadelphia (6RT 766).

b) That he had told his wife, in Los Angeles, before she left for Philadelphia (the home of the defendant Palermo) not to talk to Palermo (8 RT 1054).

c) That he did not know his wife was in Philadelphia (8 RT 1030; 10 RT 1483).

d) That he told her he didn't want to have anything to do with securing \$25,000 from Palermo (8 RT 1033).

e) That he didn't want his wife in Philadelphia talking to Palermo (8 RT 1033, 1054).

f) That he did not discuss with his wife, before she went East, a plan by which he would obtain money from the defendants (9 RT 1262).

g) That in a telephone conversation with Palermo:

24/ See Carbo's Opening Brief, Appendix "B", pp. 16-20, for more detailed references.

25/ We shall point out later, infra at pp. 90-92, the bases for our assertion that the testimony was false; additionally, in Appendix "C", in columnar form, we set forth, for the convenience of the Court, Leonard's testimony, and the demonstration of its falsity in specific instances.

- (1) he did not tell Palermo that he wanted to go back East and talk to him (8 RT 1044);
- (2) that he did not ask Palermo for money to go to Philadelphia (8 RT 1044);
- (3) that he did not say to Palermo that two witnesses had already been served with subpoenas to appear in the trial of this case (8 RT 1037).

2. The falsity of the foregoing is thus proved:

A. Palermo made recordings of the telephone conversations referred to. ^{26/} Those recordings demonstrate to a certainty that:

- (a) Leonard knew (through a telephone conversation he had prior thereto with his wife) that she had asked for \$25,000 (Appendix "B", p. 5).

^{26/} The tapes are in evidence, as Exhibits C, D and E (21 RT 3059); the conversations were played to the jury (ibid and RT 1652-3, 1655). Because of difficulty in making a transcript of them, the trial court did not require that they be reported and transcribed (RT 1570). Major portions of the recordings were called to the attention of the jury, during final arguments, and appear at 47 RT 7176-7180; portions are also referred to in Carbo's Opening Brief, Appendix "B", pp. 16-20.

For the convenience of the Court, we annex as an Appendix "B" a complete transcript of the recordings received in evidence, prepared for our own use from Exhibit E, which is a clarified copy made from the actual recordings, Exhibits C and D (RT 1643-44). We assume if appellee deems our version of them to be inaccurate in any respect it will call the inaccuracy to the attention of this Court.

(b) Leonard was phoning Palermo because his (Leonard's) wife had told him to (Appendix "B", p. 1).

(c) Leonard said, at the very beginning of the first telephone conversation that he "think(s) that something can be done. . . . if I can get back there and talk to you" (Appendix "B", p. 1). and Leonard asked "Where do you want me to come to?" (ibid), stating "it can be anywhere". (Appendix "B", p. 2).

(d) Leonard asked Palermo to pay his fare: "soon as I can get a flight or you send me some dough" (Appendix "B", p. 2).

(e) That when asked by Palermo, "What do you want", Leonard replied "I'll talk to you when I get there. You know." (Appendix "B", p. 4).

(f) Leonard's response to a query by Palermo: "You know what your wife said", was "Yeah"; then Palermo said "Twenty Five Big Ones" (\$25,000), to which Leonard responded, "I can talk to -- as soon as I get there I'll talk to you" (Appendix "B", p. 5).

(g) Indeed, in the early part of the conversation, when Palermo asked "What's on your mind", Leonard expressed his desire for

the money (and his false solicitude for the well-being of the defendants and their families) with the reply: "I think you know what the hell it was. . . . What the hell, I don't want to see anybody go to jail. Everybody has got families." (Appendix "B", p. 1).

(h) Leonard stated to Palermo that they had already started serving subpoenas; and had served Jordan and McCoy (Appendix "B", p. 8).

B. On cross-examination, Leonard finally admitted (RT 1265) that he was willing to accept \$25,000 from Palermo.

Faced with the foregoing, with Leonard stripped of integrity and denuded of probity, the prosecution made the following statements to the jury in the final arguments:

(a) "There would seem to be no question that they had talked about this before she went and that they had decided that if Mrs. Leonard obtained a sum of money or promise of a sum of money that Leonard would attempt to leave the country. I don't think there is any doubt of that." (RT 7055).

(b) "It's true Leonard's wife had contacted Palermo in Philadelphia, but that had fallen through." (47 RT 7060).

(c) "And they ask you to condemn Jack

Leonard because Leonard lets his wife go to Philadelphia. " (49 RT 7546).

(d) " ... Leonard would have apparently been willing to accept the \$25,000.00 and to attempt to leave the country, in order that he would not have to testify in this case. " (RT 7056).

(e) " ... Leonard's plans to obtain money were not so well made that he was ready to go to Philadelphia and get it ... " (47 RT 7060; emphasis ours).

3. The foregoing testimony (supra, pp. 89-90) was known by the prosecution to be false. 27/

a) After the introduction into evidence, and the playing of the recordings, and after the cross-examination of Leonard, the falsity of his testimony became so patent, we suggest, that even the prosecution saw it.

b) The statements made by the prosecution to the jury, quoted above, would not have been made, if the Government did not deem Leonard's testimony false -- although we concede, the prosecutor did not tell the jury that the evidence was false.

27/ We are not asserting that the prosecution knew the evidence to be false, when it first elicited it, from Leonard, on direct examination -- his testimony that he did not authorize his wife to contact Palermo (6 RT 766).

4. The prosecution did not fulfill its obligation of correcting the false evidence. 28/

That duty was two-fold: to do so before both triers of fact below, both before the trial court and before the jury.

a) Before the Trial Court.

On the Appellants' Motion for New Trial, and Supplemental Motion for New Trial (see Carbo's Opening Brief, pp. 42-43), one of the central issues was the credibility of Leonard, the Government's principal witness.

To the trial court, then sitting as a "thirteenth juror", who had the duty of weighing the evidence and determining the credibility of witnesses, 29/ the prosecutor represented unequivocally (51 RT 7950) " ... Leonard was completely truthful. " 30/

Had the Government conceded that Leonard had given false testimony, on as important a matter as to whether he was willing to sell his testimony for money, Judge Boldt would, in our view, have ruled, pursuant to Rule 25, that he was in no position to adjudge the credibility of the Government's main witness, and hence,

28/ "The same result (as the knowing use of false evidence) obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. " Napue v. Illinois, 360 U.S. 264, 269.

29/ Judge Boldt had not heard the testimony; hence he did not observe the demeanor of any witness.

30/ The prosecutor made no statement similar to those made to the jury, supra, at pp. 92-93.

would have granted the Supplemental Motions for New Trial.

b) Before the Jury.

Either before, or, minimally at the final arguments to the jury (all of the evidence being concluded), it was the obligation of the prosecution to apprise the jury that the portion of Leonard's testimony heretofore discussed (supra, at pp. 89-90) was false; 31/ and to so advise the jury in language clear, unequivocal and unambiguous.

Instead, the prosecution satisfied itself 32/ by a process of double-talk; first, ambivalent intimations of falsity, to which we have adverted (supra, at pp. 92-93), then negating these by unqualified asseverations of Leonard's total credibility and honesty -- which we now cite:

1) That the prosecution was requesting the jury to accept Leonard's testimony, whether or not there was any evidence corroborating him (46 RT 6827).

2) That nothing offered by the defense had impeached Leonard (46 RT 6827).

31/ The Government called Leonard its "principal witness" (51 RT 7962).

32/ But not the commands of the Constitution; nor the rudimentary requirements of fair play.

3) That Leonard was not a perjurer
(49 RT 7529).

4) That Leonard was basically honest
(46 RT 6943).

5) That he was not motivated by greed
or profit (46 RT 6902).

Moreover, that the prosecutor never intended to say, or intended the jury to understand him to say, that Leonard's testimony was false in any respect, is demonstrated by the following representations to this Court by the prosecution (Appellee's Brief, p. 302):

"The Government at no time characterized Leonard's testimony as 'false' in any respect and, as a matter of fact, it is the Government's position to this day that Leonard testified fully, truthfully, courageously, and to the best of his ability, and that he did not knowingly lie or distort in any aspect of his testimony. . . . " (Emphasis ours).

VII.

APPELLANT ADOPTS IN SO FAR AS APPLICABLE
TO HIM THE POINTS MADE IN THE REPLY
BRIEFS OF THE OTHER APPELLANTS HEREIN.

CONCLUSION

The judgments should be reversed.

Respectfully submitted,

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Attorneys for Appellant
Paul John Carbo.

APPENDIX "A"

INSTRUCTIONS FROM UNITED STATES v.
SCHNEIDERMAN, 106 F.S. 892, 903
(S.D. Cal. 1952)

" . . . [T]he jury will be instructed substantially as follows:

"In your consideration of the evidence you should first determine whether or not the conspiracy existed as charged in the indictment. If you conclude that such conspiracy did exist, you should next determine, as to each defendant, whether or not he or she was knowingly and willfully a party to or member of the conspiracy.

"In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements or declarations of others. That is to say, you must determine the issue as to the conspiracy membership of a particular defendant from any evidence as to his or her own statements or declarations and acts or conduct.

"If you find that the alleged conspiracy did exist and that all or any of the defendants were members of such conspiracy as charged, you should then determine whether the alleged club chairmen, teachers and others mentioned in the testimony, but not named as defendants in the indictment, were knowingly and willfully members

of the conspiracy during the period of time covered in the indictment. In this determination, as in the determination of the conspiracy membership of any defendant, only the statements or declarations and acts or conduct of the person whose membership is in question, and not the statements or acts of others, may be considered.

"If and when the existence of the conspiracy charged in the indictment and the membership of all or any of the defendants in such conspiracy has been found, then the acts thereafter done and the statements or declarations thereafter made by any person found by you to be a member of the conspiracy may be considered in connection with the case as to any defendant whom you find to have been a member of the conspiracy, even though such acts and declarations may have been made in the absence and without the knowledge of such defendant, provided such acts were done and such statements or declarations were made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

"So if you conclude from the evidence that a defendant was a member of the conspiracy, you may then consider as if made by him or her any statements or declarations of other members of the conspiracy, including other defendants who you may find were

members of the conspiracy, provided such statements or declarations were made during the existence of the conspiracy and in furtherance of an object or purpose of the conspiracy as charged in the indictment. But otherwise any admission or incriminatory statement made outside of court by one defendant may not be considered as evidence against another defendant not present when the statement was made."

APPENDIX "B"

TELEPHONE CONVERSATIONS BETWEEN
PALERMO AND LEONARD
(From Defendants' Exhibit E)
(P = Palermo L = Leonard)

November 6, 1959

P: Hello

L: Hello

P: Jack, How are you?

L: Yea, What's doing?

P: Not much.

L: Talked to party yesterday. She said I should call at 8 tonight. Tough talking on the damn phone, though.

P: Uh-huh.

L: Think that something can be done. You know, what the hell, if I can get back there and talk to you.

P: Well, what's on your mind?

L: Well, I think you know what the hell it was. Either I sign an affidavit, or something. What the hell I don't want to see anybody go to jail. Everybody has got families. You know.

P: Uh-huh. What will you do?

L: Where would you want me to come to?

P: Where do you want?

L: Well, doesn't make too much difference to me. Only thing is my father is sick. That is the only reason I mentioned Arkansas. He's sicker than hell down there. I could kill

two birds with one stone.

P: Why Arkansas?

L: I mentioned Little Rock. He's in Hot Springs, in the hospital.

P: Why Arkansas?

L: Huh?

P: Why Arkansas?

L: Like I said, the only reason I mentioned there, my father's sick. I could kill two birds with one stone. While taking care of this, I can stop in and see him. But it don't have to be there. It can be anywhere. I could go on from there wherever I go.

P: It's too far.

L: Well, where would you want me to come to Pittsburgh? Anywhere. I don't care wherever the hell you want me to go.

P: Uh-huh.

L: Doesn't make any difference. What the hell, as long as I, you know, I don't want to go into Philadelphia.

P: When?

L: Soon as I can get a flight or you send me some dough. I no dough to get back to you. I can get a flight out tomorrow, I guess, or Sunday morning. As soon as I can get a flight out of here.

P: I see. When will you get the flight?

L: Well, I don't know. I haven't even checked any flights, cause I didn't know, you know, I can check a flight and see

what the hell flight I can get on. Where would you want me to --

P: What place do you suggest?

L: Well, hell, I don't know anything about the country back there. I have never been anywhere, you know. I have never been in Pittsburgh in my life. I have never been to any of those other places.

P: I'd see you any place. I wouldn't be afraid to see you.

L: What the hell, I don't want to come in to Philly.

P: I wouldn't care who saw me. Why not Philadelphia?

L: Well, hell, I don't know, the only thing there are too God damn many people watching all the time.

P: I wouldn't care who saw me. I am allowed to talk to you.

L: O.K. I will come in there, it doesn't make any difference to me.

P: Course, all you got to do, you know, tell the truth. We don't have to be afraid.

L: Only thing is, I have already made, you know, affidavits. And I've got to know what the hell I'm doing. So if you want to talk, well I'll come back and talk.

P: Of course, you and I, I mean your friends.

L: What do you want me to do?

P: What day do you want to do it?

L: Any time you want me to come back, I'll be there.

P: It will be up to you.

L: Well, I mean, uh, I can come in any time.

P: It's what you want. What's on your mind? What do you want?

L: What?

P: What do you want?

L: Well, hell, I'll talk to you when I get there. You know.

P: What do you want to do?

L: I'll talk to you when I get there.

P: Sunday?

L: Yea. I could be Sunday if you want me to come back Sunday.

P: Where at?

L: Christ, any where you want, I don't care.

P: Philly?

L: Any place you want where it will be easy on you.

P: Would you want to come to Philly?

L: Well, hell, I don't want to, but I will. You know.

P: I see. I'm just trying to think. O.K. Sunday will be all right.

L: O.K. Well, how in the hell am I going to get the ticket or the dough or something?

P: Can't you get that back there?

L: Christ no. I have been borrowing from this guy. I've been borrowing to live on for Christ sake. Truman's got me black-balled everywhere; I can't move.

P: Who?

L: Truman's got me black-balled so much I can't move. Some

guy was going to get me a job. First thing he says, no, he says, Truman won't give me any shows if I do.

P: How much money will you need to come in?

L: Huh? Just the ticket. What the hell I need?

P: Just the ticket?

L: Yeh.

P: You know what your wife said?

L: Yeah.

P: 25 big ones.

L: I can talk to -- as soon as I get there I'll talk to you.

P: Uh-huh, well how much will you need for the fares, you know, to come in?

L: Well, I don't know what the hell they are. What are they?

P: You just need the fare money?

L: Yea. What the hell will I need when I get there, \$20.00? or something -- enough to stay all night, or something?

P: Where would you want it sent?

L: Well you can have her send it, or you can send it. Send it right directly to the house. I don't give a shit. You can give it to her and have her send it. It don't make any difference to me.

P: Give it to her and have her send it. Is that what you want?

L: Yea. You can give it to her and she can send it right to the house.

P: I'll give it to her.

L: O. K.

P: That's what you want?

L: Yea.

P: You want to call me Sunday?

L: Yea. What time?

P: Well let's see, say 7:30.

L: 7:30 in the morning?

P: Your time.

L: 7:30 our time, be 10:30 your time.

P: Yea.

L: At this same number?

P: Yeah.

L: O.K. I'll call you at 7:30, but if you want me back there, get in touch with her and get the dough here. You know.

P: Yeah.

L: In that way I'll go ahead and make a reservation tomorrow morning or tonight.

P: Uh, huh.

L: So, I'll hang up. I'm running out of change anyway.

P: Make it 9:30 your time.

L: 9:30 our time.

P: Right.

L: Yeah, 9:30 my time.

P: Yea, listen. Alright, make it 9:30 your time.

L: O.K.

P: Right. Bye.

November 9, 1959

P: Hello.

L: Hello. What's doing?

L: You know what's doing.

P: What's going on?

P: What's going on up there?

L: Nothing. Christ - nothing at all.

P: I can't hear you.

L: What?

P: Talk a little louder.

L: It's as loud as I can talk.

P: O. K.

L: Turn the machine off and you can hear me.

P: Huh?

L: Turn the machine off and you can hear me.

P: Turn who off?

L: Turn the bug off and you can hear me better.

P: Oh, you kiddin'? Did you talk to your wife and get my message?

L: Yea. She wanted me to come in Wednesday and then she said no. And I don't know what the hell's going on.

P: Well she was supposed to meet me today and didn't.

L: She's sick as hell. She went to the doctor's and got a shot this afternoon.

P: Yeah, she said she was sick.

L: Yeah, she was sick as hell. When she called me she could hardly talk.

P: She wanted me to bring the money up there. I'm not going up there.

L: No, I don't blame you. I mean, well, did you want her to come up there, or what?

P: I'm not gonna do that.

L: No, hell no.

P: Do you want to see me? I'll talk to you.

L: Uh, huh. Well I don't know, whether you want to do it or want to see me or not, you know, uh. They started handing subpoenas out here yesterday, you know.

P: Huh?

L: They started handing subpoenas out here yesterday.

P: Uh, huh.

L: They caught two guys just as they were getting on a plane.

P: Who?

L: They caught two fellows just as they were getting on a plane.

P: Who's that?

L: Jordan and McCoy.

P: Uh, huh.

L: They were going to South America and they caught them just as they were getting on, you know. I don't know what you wanted to do. And so I thought I'd call. She told me to call you at eight o'clock.

P: Like I told you before, Jack, you will have to come in on



your own.

L: Uh, huh. Well I can talk to her. I have three cents, and you know, where to talk, where to come back, you know. I haven't got three cents for tickets.

P: Well, what do you want to do?

L: Well that's what I said - you know - pay the way. I haven't got three cents. I can't get a load here.

P: I don't want it to look like - as if I'm paying you to come in.

L: Oh, no, What the hell, you know. If I go there and testify under oath and tell the truth, then everybody's going to go to jail.

P: If I a here -- you come in, looks like I'm paying your way, that's no good.

L: Oh shit. No, she said it, you know.

P: She asked me to bring the money up there. I'm not going to do that.

L: No, I'll tell her to go back up there. She should feel alright by tomorrow. No use making those trips, you know, for waste.

P: Uh.

L: She said you were going to call her after I talked to you.

P: Yea.

L: If you want her to come up there, well just tell her to come up there and quit talking.

P: Uh huh.

L: I made an affidavit and everything, Jesus Christ. I don't

want everybody to go to jail; that's what's got to happen if I swear to - uh - all the thing, you know.

P: What did you say?

L: I said if I get on the stand and swear to the truth, everybody's going to jail.

P: Uh huh.

L: Well I've only got about a dollar and a quarter change, so I'm going to have to hang up. So give her a buzz --

P: You want me to call her?

L: And let her know what you're going to do.

P: Uh huh. Can't you -- you'll have to come in on your own. I might as well tell you that now.

L: Well I haven't got eight cents. I won't be able to do it. I couldn't get a ticket anywhere. I mean if she can send it to me, if she can get it from her brother or somebody else, that'd be alright, but I don't know whether they got it or not.

P: Well, that'd be better.

L: I doubt if they've even got it, you know. The only thing is, when I get there I'd have to pay them back and I couldn't pay them back, you know.

P: Uh huh.

L: You give her a ring and see what the hell you can come out with and then I'll talk to her in the morning.

P: When you going to talk to her, now?

L: Well either tonight or in the morning. I only got a little bit of change, 'cause she can call me at the house, but here

I'm calling from a pay phone. I only got a dollar and a half more change, here.

P: O. K., then, forget it.

L: O. K.

P: O. K.



APPENDIX "C"

Leonard's Testimony

1. He never authorized his wife to contact Palermo in Philadelphia (6 R. T. 766).

2. That he told his wife, in Los Angeles, before she left for

Demonstration of its Falsity

1. The prosecutor's following statements to the jury:

i. "There would seem to be no question that they had talked about this before she went and that they had decided that if Mrs. Leonard obtained a sum of money or promise of a sum of money that Leonard would attempt to leave the country. I don't think there is any doubt of that."
(RT 7055.)

ii. "And they ask you to condemn Jack Leonard because Leonard lets his wife go to Philadelphia." (49 RT 7546.)

iii. ". . . Leonard's plans to obtain money were not so well made that he was ready to go to Philadelphia and get it . . ."
(47 RT 7060.) (Italics ours.)

2. Items above.



Leonard's Testimony

Philadelphia not to talk to

Palermo (8 R. T. 1054).

3. That he did not know his wife was in Philadelphia (8 R. T. 1054).

4. That he told her he didn't want anything to do with securing \$25,000 from Palermo. (8 RT 1033)

5. That he didn't want his wife in Philadelphia talking to Palermo (8 RT 1033, 1054).

6. That he did not discuss with his wife, before she went East, a plan to obtain money from the defendants (8 RT 1262).

Demonstration of its Falsity

3. Items above; and Recordings, Appendix "B", p. B-1:
Leonard: "Talked to party (his wife) yesterday. She said I should call at 8 tonight."

4. Items above, and Recording (Appendix "B", p. B-5):
Palermo: "You know what your wife said?"

Leonard: "Yeah."

Palermo: "25 big ones."

Leonard: "I can talk to -- as soon as I get there, I'll talk to you."

5. See items above.

6. Items above, particularly prosecutor's statement:

" . . . Leonard's plans to obtain money were not so well made that he was ready to go to



Leonard's Testimony

7. That in a telephone conversation with Palermo

(1) he did not tell Palermo that he wanted to go back East and talk to him (8 RT 1044).

(2) he did not ask Palermo for money to go to Philadelphia (8 RT 1044).

(3) he did not say to Palermo that two witnesses had already been served with subpoenas to appear in the trial of the case (8 RT 1037).

Demonstration of its Falsity

Philadelphia and get it. . . ."
(47 RT 7060.) (Italics ours.)

(1) See Recording, Appendix "B", p. B-1:

Leonard: "Think that something can be done. You know, what the hell, if I can get back and talk to you."

(2) Recording, Appendix "B", p. B-2:

Leonard: "Soon as I can get a flight or you send me the dough."

(3) Recording, Appendix "B", p. B-8:

Palermo: "Do you want to see me? I'll talk to you."

Leonard: "Uh, huh. Well I don't know, whether you want to do it or want to see me or not, you know, uh They started handing subpoenas out here yesterday, you know."

Palermo: "Huh?"



Leonard's Testimony

Demonstration of its Falsity

Leonard: "They started handing subpoenas out here yesterday."

Palermo: "Uh, huh."

Leonard: "They caught two guys just as they were getting on a plane."

Palermo: "Who?"

Leonard: "They caught two fellows just as they were getting on a plane."

Palermo: "Who's that?"

Leonard: "Jordan and McCoy."

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK PALERMO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from
The United States District Court
Southern District of California

SUPPLEMENTAL REPLY BRIEF ON BEHALF
OF FRANK PALERMO TO ANSWER TO THE
SUPPLEMENTAL BRIEF

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1971-1-18

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STATUTES

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK PALERMO,

Appellant,

vs

UNITED STATES OF AMERICA,

Appellee.

Appeal from
The United States District Court
Southern District of California

Comes now Frank Palermo and replies to arguments presented by the appellee in reference to the supplemental brief.

SUMMARY OF REPLY

1. Section 1951 of Title 18, inherently and as construed and applied in this case, violates the Fifth and Tenth Amendments to the Constitution of the United States. The so-called anti-racketeering statute was aimed at labor and labor racketeering dealing with products manufactured and shipped in commerce and was not concerned with local activities such as boxing and prize fighting. The fact that news is broadcast regard-

ing these activities does not make them commerce within the provisions of Section 1951 of Title 18.

2. There was a merger of the conspiracy and the substantive offenses since both relied on the sum total of evidence produced and were not separately considered and one did not rely on evidence not involved in the other.

3. Federal courts do not have jurisdiction under the Tenth Amendment of domestic violence, if any occurred, and is only concerned with goods and matters in interstate commerce. The Tenth Amendment forbids the federal government to invade the domain of state concern and state prosecutions. If any offenses occurred, they were purely local and not within the jurisdiction of the federal court. The indictment therefore should be dismissed.

4. A person charged with a crime is presumptively innocent until he is convicted and is entitled to bail at all times until the verdict. No constitutional provisions, statute, rule or regulation denies to an American that liberty prior to conviction if he can make bail after being accused of a crime. In a non-capital case it is a denial of due process and is a denial of the rights guaranteed by the Fifth Amendment to the Constitution and by the Eighth Amendment to the

Constitution of the United States to arbitrarily and capriciously put a person in jail prior to trial and conviction. To do so is to deny him a liberty necessary to prepare his defense adequately and without which he is denied due process of law and the equal protection of the laws.

ARGUMENT

APPELLANT CONTENDS THAT THE INDICTMENT

DOES NOT BELONG IN A FEDERAL COURT

Appellee says correctly that we contend that the indictment in the case does not belong in a federal court (appellee's brief, p. 155).

This case has attempted to transfer the federal court into a police court and if this judgment is sustained it will have the effect of extending the federal powers into police court actions. Congress never intended it and neither did the framers of the Constitution. The original makers of the Constitution reserved all these powers to the states and to localities in the states and only gave those powers expressly granted by the federal Constitution. Such offenses as are charged here were not intended by the makers of the Constitution to be ballooned into federal crimes and to divert the federal courts into state courts

covering offenses exclusively reserved to the states (Tenth Amendment to the Constitution of the United States). It was the historic fear of the makers of our Constitution that police powers should never be lodged in the central government and when we look around the world and see how the concentration of police powers in the central government, through either its police or military, have enable the overthrow of governments, we can well understand the wisdom of the makers of our Constitution and the provisions contained in the Tenth Amendment to the Constitution of the United States.

Extraordinary conditions do not create or enlarge constitutional powers.

Schechter Poultry Corp. v. U.S., 295 US 495,
79 L.ed. 1570

Powers not granted to the United States by the Constitution are prohibited.

U.S. v. Butler, 297 US 1, 80 L.ed. 477

Our federal system is one of delegated powers and the administration of criminal justice rests with the state.

Tenth Amendment to the Constitution of the
United States

Complaint is made by the appellee that this was raised for the first time on appeal, but constitutional

issues in which all the facts are before the court will be considered by an appellate court wherever raised in connection with the appeal.

In Pollard v. U.S., 352 US 354 at 359, the court there said:

"The record now before us adequately states the facts for final determination of the basic issues"

and proceeded to decide the issues on the merits. The Supreme Court of the United States has repeatedly said that where constitutional issues are raised it will examine the record for its own determination whether those questions will be determined. Even a collateral attack would be subject to review by the Supreme Court of the United States.

Wells v. U.S., 318 US 257, 87 L.ed. 746

Therefore, we believe that this Court should determine whether this case, which involves a sport not specifically designated by any act of Congress as coming within its purview, is to be ballooned into a definition of "commerce" so as to come within the federal jurisdiction. We contend that it does not.

We further contend that appellee has failed to meet our argument under the Tenth Amendment and the Fifth Amendment to the Constitution of the United States.

All of the cases dealing with the anti-racketeering statute apparently have had to do with labor.

See:

Footnote to Callanan v. U.S., 364 US 587,

5 L.ed. 2d 312, at 313

138 ALR 811 (as to a collection of cases)

Footnote, 5 L.ed. at page 316, et seq.

The anti-racketeering Act of 1934, 73rd Congress, Second Session, apparently arose from the great strength which labor got in the years that followed and was aimed particularly at labor officials.

Nick v. U.S., 122 F.2d 660

Products shipped within interstate commerce were held to be of such a character as to bring the act within the commerce clause of the Constitution.

However, boxing and prize fighting, which are always done on a local level, certainly do not bring this activity within the sphere of commerce or a manufactured product shipped in interstate commerce. The mere fact that a fight might be televised or broadcast on the radio does not make the fight or fighting activities commerce any more than a broadcast from Congress or by political speakers make it commerce. As construed and applied in this case, we respectfully contend that boxing and prize fighting are not

"commerce" within the commerce clause of the Constitution and that therefore the indictment fails to state an offense against the laws of the United States.

Where no public offense is stated within the purview of the laws of the United States, it may be raised at any stage of the proceedings and even attacked collaterally by Section 2255 of Title 28 or by habeas corpus.

U.S. v. Resnick, 299 US 207, 81 L.ed. 127

U.S. v. Lacher, 134 US 624, 33 L.ed. 1080

Monge v. Sanford, 145 F.2d 227

Clawans v. Rives, 104 F.2d 240

It is therefore quite apparent that the anti-racketeering statute has been stretched into a domain never intended by Congress nor shown by Congress to have intended to expand the federal government into state court activities of the nature of boxing and prize fighting. Had Congress intended to do so, there would have been no reason why either in the statutes or in the debates on the subject prize fighting and boxing might not have been mentioned.

Appellee has failed to meet our issues raised that boxing and charges growing out of it and local misconduct or violence, if any occurred, come only within the purview of the state and are forbidden

by the Tenth Amendment to come within the jurisdiction of the federal court. We renew that objection and move the Court to dismiss the indictment on the ground that the federal court does not have jurisdiction of the offenses here charged.

THE MERGER OF THE COUNTS AND CHARGES

The government in its reply to our statement that there was a merger of the conspiracy with the substantive offenses, relied on Callanan v. U.S., 364 US 587, 5 L.ed.2d 312. That case, while holding that conspiracy and the substantive offenses are separate and distinct offenses, does not hold that where all of the evidence to determine the substantive offense is relied upon for the conspiracy and they are one and the same that there is no merger. Pinkerton v. U.S., 328 US 640, 643, 90 L.ed. 1489, 1494, so held. .

The Callanan case only went to the question of double punishment for the separate offenses. In the Callanan case probation was granted on the second count.

The case did not touch upon the issue of merger in the trial of the action where the sum total of the evidence for the conspiracy charges was equally the sum total of the evidence for the substantive charges. In that case Pinkerton holds that there is a merger.

Otherwise double jeopardy would set in and one would be prosecuted twice for the same offense spelled out in two different ways and this is forbidden by the Fifth Amendment to the Constitution of the United States.

See:

Section 654 Penal Code, State of California
Ex parte Lang, 18 Wall. (85 US 163, 21 L.ed.
872)

Kepner v. U.S., 195 US 100, 49 L.ed. 114
Fifth Amendment to the Consttution of the
United States

Jarl v. U.S., 19 F.2d 891

Callanan only went to the issue of punishment and
did not set forth the facts showing that the conspiracy
charges and substantive offenses were based upon the
same evidence and did not raise the point we have
raised here.

BAIL PENDING APPEAL

Appellee in its brief takes the position that the denial of bail during trial was res judicata because this Court, in two decisions, while first authorizing bail in the second decision, upheld the trial court in revoking bail during trial.

Carbo v. U.S., 288 F.2d 282

Carbo v. U.S., 288 F.2d 686

That case, while upholding the right to bail, did not pass upon the issue as to whether such a denial of bail constituted a denial of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States and to the historic right to bail in order to adequately and properly prepare one's defense.

Although the case of Carbo v. U.S. held that a court may revoke bail during a non-capital trial if there is reason to believe the trial may be disrupted or impeded by flight of a defendant or by his activities in or out of the courtroom during the trial, no such provision is contained either in the Constitution or in the Federal Rules of Criminal Procedure.

Furthermore, as to the appellant Frank Palermo, for whom this brief is being written, there was no evidence and there is no evidence that he would flee

or that he did not respond at all times to the orders of the court or that he was in any way involved in impeding the progress of the trial. Each defendant must be looked upon separately.

Prior to the conclusion of the trial the defendants were presumed and are presumed at law to be innocent and there is no authority in the United States for putting an innocent man in jail and holding him there without bail in a non-capital case. We respectfully state that to do so, when he is able to make bond, is to deprive him of his liberty without due process of law and to deprive him of his right fully and adequately to prepare his defense and to confer with his lawyers at all times in that preparation.

Stack v. Boyle, 342 US 1, 96 L.ed. 3

Hudson v. Parker, 156 US 277, 295, 39 L.ed.

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Indeed, it is stated in Carbo v. U.S., 288 F.2d 282:

"Indeed freedom from custody, cherished at all times has special importance to an individual while he is defending himself in a criminal prosecution.

But if a court may arbitrarily take that freedom away because he does not like the character of the

defendant or because he has orders from Washington or because of pressures, political, publicity-wise or otherwise, it is taking away a fundamental right guaranteed by the Constitution and denies to the defendant that type of liberty which would enable him fairly to prepare and defend himself in his trouble. This type of procedure might be well in totalitarian countries, against which we seek to set an example, but certainly nothing in the law justifies this procedure which deprived this defendant of a constitutional right guaranteed by the Eighth Amendment to the Constitution and by all decisions heretofore relating to bail. Certainly this point, which has been slid over by the appellee because it cannot be met by any logical answer, deserves the fullest consideration by this Court on an appeal from the judgments and from the constitutional rights presented herein.

It is ridiculous to say that the great United States, with all its law enforcement agencies and its protective resources, has to put a man or five men in jail to protect some prize fighter or his manager. The idea is absurd and laughable. The government has always been able to protect its witnesses and the law provides that even witnesses may be placed in protective custody but does not provide that the

defendant who is accused can be put into jail because the witness claims to have received some telephone calls of a threatening nature.

CONCLUSION

We adopt all of the points applicable to this appellant that may be presented in other briefs. Eastern counsel for Frank Palermo may be filing a separate response as to the points raised earlier in the opening brief.

We pray for reversal of the judgment below and for an order dismissing the indictment as beyond the jurisdiction of the federal court.

Respectfully submitted,

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FRANK PALERMO

Morris Lavine, counsel of record for Frank Palermo, hereby certifies that he has examined Rules 18 and 19 of the Rules of the United States Court of Appeals for the Ninth Circuit and is familiar with the same and that he believes that this supplemental answer to the appellee's reply brief conforms to those Rules.

Dated: September 29, 1962.

Morris Lavine

Attorney for Appellant Frank
Palermo

No. 17762

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

LOUIS TOM DRAGNA

APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

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LOUIS TOM DRAGNA

I

THE EVIDENCE IS INSUFFICIENT
(Reply to Appellee's Point VI, B 3(c)(4);
pp. 228-229)

Bearing in mind that the showing as to Dragna's (as with any defendant in a conspiracy case) membership in the alleged conspiracy must be done by means of evidence of his own acts, declarations and conduct, and considering that the conspiracies here charged were (1) "willfully to obstruct, delay and affect interstate commerce by means of extortion" (CT 2), and (2) "Willfully and with intent to extort money and a thing of value . . . to transmit in interstate commerce communications containing threats" (CT 9), it simply

cannot be said that such evidence had been produced by the prosecution in this case. In this connection, sight should not be lost of the fact that Judge Tolin, at the time of his death, had under consideration, and had not denied as he had the other defendants' (RT 7806), Dragna's motion for judgment of acquittal at the end of the case (ibid).

Appellee has attempted to set forth (Br. 228) what it considers to be the important evidence showing this appellant's membership, i. e. agreement, in the conspiracy. We submit it has not shown enough.^{1/} (See Dragna Op. Br. p. 29.)

Considering first the state of the record at the conclusion of the prosecution's case, we set forth here in haec verba what appellee considers to be the evidence of Dragna's acts, statements and conduct which go to show that Dragna entered into the alleged unlawful agreement. This from appellee's brief, pages 228-229):

"On May 4, 1959, Dragna entered Leonard's office with Palermo. . . . Dragna listened to Palermo's

^{1/} Parenthetically, though not at this point, appellee describes appellant as "furtive and sinister in the day to day conduct of (his) business affairs . . . without offices or roots in any community in this country and (that he) employed crude methods in (his) acquisition of money and economic power" (Br. 11). There is just not one word in the record, not one word, to substantiate this statement. Indeed there is positive evidence precisely to the contrary. Thus, Dragna lives in Los Angeles County with his wife and child (RT 5601) and he owns his own home (ibid). He is the general manager of Tropicana Sportswear in Los Angeles and had been employed there for three years at the time of the trial (ibid). He has lived around Los Angeles at least since the 1930's (RT 5643).

diatribe 2/ about Leonard having double-crossed the appellants 3/ with respect to the control of Jordan. . . . Dragna added: 'Well, you are wrong there, Jackie'. 4/ Dragna told Leonard he was dealing with big people 5/. . . . Dragna asked Leonard if Nesseth did not live out his way and Leonard, attempting to mislead Dragna, 6/ said that Nesseth lived near San Bernardino. Dragna, knowingly, 7/ said that Nesseth lived in West Covina. Then Dragna pointedly 8/ inquired: 'He has a wife and kids doesn't

2/ The word is appellee's. Palermo's conversation can hardly be thus described (RT 728-732).

3/ This is grossly incorrect. There is not one word in what Palermo told Leonard (RT 728-732) which could even faintly be described as referring to "appellants", i. e., the defendants in the action. Indeed, there is nothing in the conversation (ibid) about anybody's being double-crossed.

4/ Appellee omits to state that this sentence by Dragna is in response to a question put to him by Palermo. Leonard testified (RT 729): (Palermo) "turned to Mr. Dragna and said, 'I want you to hear this' ". And after stating what he wanted Dragna to hear, Palermo then said to Dragna, according to Leonard (ibid): "What do you think of that?" And then Dragna answered.

5/ This again was a statement by Dragna after Palermo had asked for his, Dragna's, opinion (RT 730). And appellee omits what Dragna said immediately thereafter (ibid): "and your word should be your bond". Such advice, sometimes solicited, sometimes not, has been given elsewhere and cannot be said to be unsound.

6/ There is nothing in the record which justifies such a description. In any event this is Leonard talking, not Dragna.

7/ Again an inference of appellee's not justified by the record.

8/ Having set up a straw man as to what it says the agreement was, appellee proceeds to infuse life into him (Continued)

he?' ... Dragna said: 'You are right in the middle of this thing, Jack'. And he said: 'You better try to get it straightened out or', he says, 'you can be in a lot of trouble'.

[6 RT 728-732] Dragna asserted, in the course of the session that 'he was acquainted with these people'.

(Referring to the Carbo group.) ^{9/} [12 RT 1700.]"

This is the evidence upon which appellee would have this Court sustain a holding that Dragna entered into and was a member of the conspiracies alleged in Counts I and V. Prior to the conversation described by appellee, and subsequent thereto, there is not one word, and not a single exhibit, in the prosecution's case of conduct by Dragna. ^{10/} Cf. Leonard's testimony before the California Athletic Commission as to the conversation (RT 1521):

"He (Dragna) didn't say anything, no threats. No -- in fact, he was a very good gentleman there. He did very little talking. Listened."

We submit that so far as this appellant, Dragna, is concerned, the assertion that he was a member of, a party to, an

^{8/} (Continued) by this barbed description or ordinary small talk. We explain below how the question of where Nesseth lived came about. And it should not be overlooked that in testifying under oath before the State Athletic Commission, Leonard said (RT 1522) that he could not recall whether it was Dragna or Palermo who asked whether Nesseth had a wife and child.

^{9/} As the parenthetical interpolation by appellee and the record (12 RT 1700) shows, this is an interpretation of Leonard's. Actually Dragna never said (ibid) that he knew Carbo or Gibson; indeed, he said he did not (RT 5607-5608), and certainly he never said he knew "the Carbo group".

^{10/} Indeed, in the whole case there is only one Government exhibit having anything to do with Dragna, and that (Exh. 143) on an irrelevant matter on rebuttal (RT 5717, 5725).

agree-er to, a conspiracy or conspiracies such as alleged in Counts I and V of the Indictment is as much a concoction and figment of the prosecution's imagination as was the Government's theory of an agreement in United States v. Bufalino, 285 F.2d 408 (CA 2, 1960). Appellee theorizes as to what the conspiracies were in this case, but so far as this appellant is concerned, it has failed to prove it. Its evidence in this regard is more flimsy than was even the evidence as to Cannone and Guccia in the Bufalino case. The method of the prosecution here in throwing all the evidence in and using it without discrimination as to all the defendants, demonstrates here, as in Bufalino, that it is "especially important for trial and appellate courts to determine the sufficiency of the evidence as to each defendant in mass conspiracy trials" (285 F.2d at 417).

The Court's attention is also directed to the cases of appellants Durkin and Powers in Dennis v. United States, 302 F.2d 5 ^{11/} (CA 10, 1962) (a conspiracy to file false non-Communist affidavits) where the appellate court held (at page 12) that as to those appellants the evidence was insufficient even though, as to Durkin, the evidence showed he was a member of the Communist Party and even had knowledge of the conspiracy, and as to Powers that he was a member of the Communist Party and knew of the influence that that Party had in the labor union. In the instant case, the evidence is much weaker, from the standpoint of the

^{11/} In appellant's opening brief, page 31, this citation was erroneously given as 302 F.2d 31.

prosecution, than it was in the case mentioned. In holding the evidence insufficient, the court there said (302 F.2d at 12):

"Mere knowledge, approval or acquiescence in the object or purpose of a conspiracy does not make one a conspirator. . . .

" . . . Without knowledge, the intent to participate in an established conspiracy cannot exist, and ' . . . to establish the intent, the evidence of knowledge must be clear, not equivocal'. . . ."

These concepts are eminently applicable here.

Not content with the showing it had made during the presentation of its case in chief, appellee felt impelled in its resume about Dragna to rely (Br. 228) on the testimony of Dragna himself and that of defendant Palermo. Thus, appellee correctly states (ibid) that "Dragna met with Palermo at Puccini's Restaurant on the evening of May 1, 1959, the day Palermo arrived in Los Angeles. [38 R. T. 5615-5616; 40 R. T. 6030-6037.]" But appellee fails to point out that the very references on which it relies shows that the meeting was a chance one, that Dragna was having dinner with his wife, that Palermo happened to come in (RT 5615) and that there was no pre-arrangement or appointment for the meeting (RT 6032).

Appellee goes on (Br. 228): "Dragna admitted that Palermo suggested that he, Dragna, contact Leonard [38 R. T. 5618-5619.]" But appellee omits setting forth that this very citation shows that

the suggestion to contact Leonard was because Leonard knew how to contact the manager of a fighter about whom Palermo had told Dragna and in whom Dragna had expressed some interest and that the suggestion had nothing to do with this case (ibid).

Appellee continues (Br. 228): "Palermo told Dragna that the purpose of his coming to Los Angeles concerned Sugar Hart". Presumably the reference appellee had in mind was 38 RT 5666-5667, since that is the reference it cites after the sentence following the one just quoted. In the first place, Palermo's telling Dragna that his purpose in coming to Los Angeles concerned Sugar Hart does nothing to show that Dragna conspired as charged in the Indictment. But more importantly, and demonstrating how the Government, after thinking up a conspiracy, is pressed to such extremes as making something, or, rather, seeking to make something, out of nothing, is this: At 38 RT 5667, Government counsel inquired of appellant whether Palermo had told him "why he was in Los Angeles at that particular time". Appellant's answer was: "I stated the Sugar Hart fight". And, indeed, so had appellant stated, and the record shows a perfectly innocent and obvious conversation which might normally occur between two acquaintances, one from one town and one from another, in a chance meeting in a restaurant when one is out for dinner with his wife. Appellant asked Palermo what he was doing in town and Palermo told him he was in to make a match involving a fighter named Sugar Hart (38 RT 5616). Surely appellee is hard pressed in seeking to bottom its case upon this slim event.

Then appellee says (Br. 228): "Dragna told Palermo to telephone him on May 4, and provided Palermo with a telephone number. [38 R. T. 5666-5667.]" What appellee omits is that after Palermo told Dragna of the possibility of obtaining a good fighter, Dragna told Palermo he would have to talk to his boss to see if he'd be interested and for Palermo to call him (38 RT 5621-5622).

Since appellee has chosen to rely upon Dragna's testimony (Br. 228), the complete story should not be left untold. Dragna's boss,^{12/} Mr. Nober, corroborated defendant's testimony (RT 5619) as to being interested in obtaining the fighter, Toluca Lopez (RT 5731-5732)^{13/} and that he told defendant to go out and see Leonard and find out more information about the fighter (RT 5733). Also, the witness Salvatore Casavona (RT 2952) corroborated defendant's testimony as to why he went out to see Leonard, namely, to see him about the fighter, Lopez (RT 5624, 5676).

Defendant's wife, likewise corroborated defendant as to the meeting with Palermo at Puccini's (RT 5745-5749).

Although called by the Government on rebuttal (RT 6349-6399), Leonard did not contradict -- indeed he was not even asked about -- the testimony of Dragna (RT 5627) and the conversation

^{12/} Actually not his employer as such, but the man who supplied defendant's business with the major portion of its contract work (RT 5724). Appellee sought to make much of the fact that defendant referred to Mr. Nober, the man who supplied the cut fabric for defendant to make up into dresses (ibid), as "boss" (RT 5721-5725), another example of the extreme ends to which appellee has been forced to go.

^{13/} And about the reference to himself as "boss" (RT 5737, 5739-5740, 5742).



which had taken place in Leonard's office, including defendant's version as to how it came about that Nesseth's place of residence was discussed, namely, that Leonard was trying to get Nesseth on the telephone (RT 5627); that Dragna wanted to leave because he had far to go and had to work that night (ibid and 5630) that when Leonard had talked to Nesseth's wife, Dragna, who was waiting to take Palermo to a cab (RT 5629), asked what the telephone prefix was (RT 5630); that when he learned it was Edgewood, defendant remarked that Nesseth lives out near him (West Covina [RT 5600]) and could not get home so soon in the traffic (RT 5630).

Nor did the Government, with its vast and efficient investigatory services, seek to challenge defendant's testimony that he did not know Daly, Gibson nor Carbo (RT 5607-5608) and had never spoken to them or Sica on the telephone (RT 5634).

In United States v. Bufalino, 285 F.2d 408, 418 (CA 2, 1960), the court pointed out "the danger of sweeping within the net of . . . a conspiracy an innocent visitor". The prosecution did that very thing here.

The evidence is insufficient as to this appellant.

II

THE TRIAL COURT FAILED TO INSTRUCT
THAT MERE KNOWLEDGE OF, OR ACQUIES-
CENCE IN, ILLEGAL CONDUCT BY OTHER
DEFENDANTS OR ASSOCIATION WITH THEM,
IS INSUFFICIENT TO ESTABLISH A DEFENDANT
AS A MEMBER OF A CONSPIRACY.
(Reply to Appellee's Point VI, 2, (b); pp. 315-316.)

As we read appellee's argument on this point, it does not dispute appellant's statement of the law or the cases he cites (Dragna Op. Br. 35-37). Appellee simply asserts that instructions which the court did give, citing (Br. 316) RT 7653-7655, 7657, 7677-7678, complied with the law.

We disagree. We do not think, for example, that an instruction which reads (RT 7657) 14/:

"It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if any of the defendants, with knowledge that it was the design that the law be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, they would be guilty. "

is an instruction such as requested by appellants (CT 648) that:

"Mere association of one defendant with another defendant or co-conspirator does not establish the

14/ We assume this is the instruction appellee had in mind when it cited this page in the record.



existence of the conspiracy or participation therein." or (CT 655) that:

"Proof of the unlawful agreement and of defendant's participation therein with knowledge of the unlawful agreement is essential, and mere evidence of participation in the offense, which is the object of the conspiracy, is insufficient."

The court did not properly instruct on this important phase of the law.

III

THE TRIAL COURT FAILED TO COMPLY WITH
RULE 30.
(Reply to Appellee's Point C, 1; (pp. 304-307)

Appellee's own argument shows how appellants were in this case prejudiced by the failure of the trial court to advise them what its instructions were going to be. Thus, in its argument as to appellants' point of the failure of the court to instruct the jury pertaining to its duty to acquit, appellee says (Br. 326-327):

"Failure of so many experienced counsel to notice any deficiency in the court's instructions . . . suggests prima facie that the plain error suggested . . . did not occur". But the instructions to the jury are not part of a game. Appellants believe that the court erroneously failed to instruct on the point and that they were entitled to so fundamental an instruction. Had the court advised

defense counsel, by telling them what it was going to charge the jury, and thus indicating that it was not going to give such a fundamental instruction, this error could have been avoided. That it was not, with due respect to the compliment to the competency of counsel, shows the prejudice.

Again, appellee suggests (Br. 325 and 322) that the failure to object under Rule 30 as to the Gibson cautionary instruction (RT 7789) and the overt act instruction (RT 7654), precludes complaint here as to those instructions. Had the court complied with what we contend is the true meaning of Rule 30, such an argument, even though, we submit, incorrect, could not be made here.

Moreover, if the trial court had advised counsel what instructions it was going to give, the various other errors in the instructions, of which appellants complain, and as to which appellee does not seek Rule 30 protection, would not have occurred. We submit that in a case as complex as this one, expecting counsel to catch errors in the instructions, either by way of omission or commission, on the run, so to speak, is not the proper and orderly way for the conduct of a trial. It violates the spirit, if not the letter, of Rule 30. It deprived defendants of a meaningful opportunity to assure that correct instructions would be given.

IV

COUNT FIVE IS UNINTELLIGIBLE
(Reply to Appellee's Point VI, A, 2(b)
pp. 159-161)

Appellee misapprehends appellant's point. And in its discussion, by arguing that distinctions and separations are not necessary, it demonstrates and explains the confusion that must have been the jury's and why all sorts of evidence came into the case which was irrelevant to it.

Appellant's point is not (Appellee's Br. 159) that a conspiracy indictment must allege overt acts which post-date the entry into the conspiracy of every member thereof, albeit we apprehend the prosecution would be hard pressed to show the membership in the conspiracy of such a late entrant. But appellant does contend that acts or conduct which are alleged to have taken place after the conspiracy has ended have no place in either the pleadings or proof. We shall not dwell on the prejudicial nature of the reputation paragraph at issue. (Reply to appellee's argument concerning the reception into evidence of the reputation testimony and the right of the prosecution to have the reputation sub-paragraph in the Indictment altogether (Appellee's Br. Point VI, A, 1; pp. 127-155) is being made in the reply brief on behalf of appellant Sica and so is not repeated here.)

Appellee fails to understand that the conspiracy it has alleged in Count V is (CT 9) "with intent to extort money and a thing of value . . . to transmit in interstate commerce

communications containing threats". That is the "scope of the conspiratorial agreement". (Grunewald v. United States, 353 U.S. 391, 397.) Once this has been done, after showing the agreement and the overt acts, the conspiracy is over and the Government is no more entitled to adduce its desired proof here, concededly prejudicial, than it has the right to adduce proof of concealment after the conspiracy is over as held by the court in Grunewald v. United States, 353 U.S. 391, Krulewitch v. United States, 336 U.S. 440, and Lutwak v. United States, 344 U.S. 604. McDonald v. United States, 89 F.2d 128, 133-134 (CCA 8, 1937), cited by appellee, is not authority to the contrary. Indeed, it supports appellant because it points out the necessity for ascertaining just what the conspiracy is and when it ends.

The point is that, as to the conspiracy charged in Count V,^{15/} once the last telephone conversation took place (April 29, 1959 [CT 9-10]), that was the end of it.^{16/} The Government's effort to continue the matter on is an attempt to do that which the Supreme Court has repeatedly said it disfavors: "broaden the already pervasive and widesweeping nets of conspiracy prosecutions". (Grunewald v. United States, 353 U.S. 391, 404.) The conspiracy

^{15/} The Government stoutly maintains that there were two conspiracies charged in the indictment (CT 58, line 22).

^{16/} Proof of this may be seen from the Government's own words (Br. 170): "(T)he conspiracy charged in Count Five could have been pleaded and proved without a single overt act involving a telephone conversation". But the agreement would have to be shown, and that agreement would have to include an agreement to make an interstate telephone call containing threats.



charged in Count V was a conspiracy to make threatening interstate telephone calls. The reputation sub-paragraph and the evidence adduced pursuant thereto have nothing to do with that charge.

The fact that paragraph 3(c) may have been an essential allegation in Count I, a proposition with which appellant disagrees, but which is treated elsewhere, does not justify its inclusion in Count V. Who can tell how the jury would have considered the evidence had it been told that it was not permitted to consider the reputation evidence as to Count V? The Government's willingness to "throw everything in", while understandable in a conspiracy case and too often effectuated, cannot excuse the expansion of the vice.

The error of leaving paragraph 3(c) in Count V was so substantive that this Court should notice it whether appellant made this specific argument in the court below or not (Appellee's Br. 161) (Rule 52(b), Federal Rules of Cr. Proc.). But, we think the point was adequately raised and argued below (CT 46, 59;^{17/} cf. CT 279-286).

^{17/} The prosecution, in arguing against the motion to strike the sub-paragraph, said (CT 59, line 23): "It is not matter which is extraneous to the indictment".

V

APPELLANT ADOPTS IN SO FAR AS APPLICABLE TO HIM THE POINTS MADE IN THE REPLY BRIEFS OF THE OTHER APPELLANTS HEREIN.

CONCLUSION

The judgments should be reversed.

Respectfully submitted,

FRED OKRAND

Attorney for Appellant
Louis Tom Dragna

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH SICA,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

CLOSING BRIEF

OF

APPELLANT JOSEPH SICA

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH SICA,

Appellant,

-VS-

UNITED STATES OF AMERICA,

Appellee.

CLOSING BRIEF
OF
APPELLANT JOSEPH SICA

- - - - -

TO THE HONORABLE HEAD JUDGE AND JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

COMES NOW the Appellant, JOSEPH SICA, and files this
his Closing Brief.

PRELIMINARY STATEMENT

There are a number of defendants in this case, as
the Court has been previously informed, and each has filed

a brief. We respectfully ask permission to adopt the arguments, and points and authorities in support thereof, filed and referred to in the Closing Briefs of the other appellants.

We have not answered each particular point or each argument advanced in the Government's Brief for the reason that we believe we have answered such arguments in our Opening Brief and, in the interest of brevity, have not referred to them here.

I

THE COURT ERRED IN PERMITTING THE WITNESS
LEONARD, ON BEHALF OF THE GOVERNMENT,
AND THE WITNESS NESSETH, ON BEHALF OF
THE GOVERNMENT, TO TESTIFY CONCERNING
THE REPUTATION OF APPELLANT SICA AS AN
UNDERWORLD FIGURE AND A STRONG-ARM MAN.

In our Opening Brief, we referred the Court to the case of Michelson v. United States, 335 U. S. 469, and the argument advanced therein in behalf of our contention that it was gross error on the part of the Court to permit the Government to put into evidence the reputation of Appellant Sica as an underworld figure and a strong-arm man at almost the inception of the case and in the Government's case-in-chief, and from the lips of their principal witnesses, Leonard and Nesseth.

The force of the argument of the Government is that Michelson is not applicable or that the rules should be extended. Michelson is a solid, seasoned decision of the Supreme Court of the United States, has been referred to in other cases, and should not be disturbed. The theory of it goes unchallenged, even by the Government. It was and is our contention that the Government could not prove in its case-in-chief the reputations of the Defendants Sica and Dragna. The matter was plainly brought to the attention of the Court by way of objection by Sica (RT 707, 708).

As was said in Michelson v. United States, 335 U. S. 469, at 474, 475:

"Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character (Greer v. United States, 245 U.S. 559, 62 L.Ed. 469, 38 Sup.Ct. 209), but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime."

To the same effect was the case of Benton v. United States, 233 Fed. 2d 491, citing Michelson with approval.

The reasoning of these cases has not been answered by Government's counsel.

The Government seeks to distinguish Michelson and Benton and refers to the following cases, which we contend are not in point and may be readily distinguished, as follows:

United States v. Compagna, 146 Fed. 2d 524,
Cert. den. 324 U. S. 867, Reh. den. 325
U. S. 892.

In this case, proof was given that the conspiracy was created solely for the control of the union and the union was the instrument used. The threats were made directly to the complaining witness by the individuals on trial.

Nick v. United States, 122 Fed. 2d 660,
Cert. den. 314 U. S. 687, Reh. den.
314 U. S. 715.

In this case, again, we have the problem of controlled labor union and the domination of the industry on a local level. Case deals only with the extortion and not with the proof thereof.

Bianchi v. United States, 219 Fed. 2d 182,
Cert. den. 349 U. S. 915, Reh. den. 349
U. S. 969.

This was again a labor dispute and the individuals on trial were the heads of the union who threatened to prolong a strike unless a payoff was made.

These cases fail to meet the basic contention of the appellant that the Court committed reversible error in allowing the prosecution to enter evidence of his character and reputation before he had offered any evidence whatsoever. It therefore appears the prosecution attempted to present its case by bootstrapping in evidence. Such practice is akin to the field of search and seizure, wherein an officer takes a person into custody, illegally searches his house and finds incriminating evidence and then uses such evidence as the basis of a complaint against the individual. In such cases our Courts are now unanimous in striking (1) down the use of such tactics to obtain convictions.

(1)

See: Johnson v. United States, 68 Sup.Ct. 367, 333 U.S. 10, 12, 13;
People v. Cahan, 44 Cal.2d 434, Supreme Court of California cited with approval in Elkins v. United States, 364 U. S. 216;
Jones v. United States, 357 U.S. 493, 499, 2 L.Ed. 1514, 78 Sup.Ct. 1253. There the Court said:
"Exceptions to the rule that a search must rest upon a search warrant have been jealously guarded and carefully drawn."
(Cited in Mosco v. United States, 301 Fed. 2d 180, 187.)

So too, the Courts must not allow evidence of the nature used in the present case to be received as it was to sustain a conviction.

The Court erred in allowing the Government's witnesses Leonard and Nesseth to refer to the Appellant Sica's reputation as Leonard did:

"Q. BY MR. GOLDSTEIN: What was there about Mr. Sica's presence at the Beverly Hilton Hotel that evening which inspired fear in you?

"OBJECTION. * * *

"A. Well, by reputation I have always known of Joe Sica as an underworld man and a strong-arm man." (RT 719, 722)

Nesseth, Leonard's associate if not partner, on direct examination by the Government in its case-in-chief, was questioned about Sica:

"Q. Now what did you know of the Defendant Sica by reputation?

"OBJECTION. (Overruled)

"A. I knew Sica by reputation only as being an underworld figure." (RT 1865)

By this testimony, and over objection, the Government itself opened the question of the Appellant Sica's character and reputation, strictly in violation

of the rules laid down in Michelson, supra. The cases and citations against such practice are legion.

It was said in Witkin, California Evidence, p. 128:

"Hence, the universal rule prohibits the prosecution from introducing it in the first instance, i.e., where the defendant has not offered evidence of his good character."

See also McCormick, Evidence, p. 324, and 1 Wigmore 55, 57, 1940 Ed.

The cases the Government cites fail to meet the basic contention that the prejudices leveled against the appellant were so great that the limiting instruction given by the Judge could not have impressed upon the minds of the jurors, as laymen, the very limited nature for which he had allowed the evidence to be entered, when the entrance was, from the beginning wrong. It is upon this fact that many a juror has inferred inadmissible facts from statements allowed to be entered into evidence. It seems that the most inept jury instruction a Judge can give to a jury, or one man to another, is to disregard something that he had heard, or to apply it only to one particular situation. (2)

(2)

No instruction to the jury could cure this error. As said in Krulewitch v. United States, 336 U.S. 440, at 453:

"The naive assumption that prejudicial effects can be overcome by instructions to the jury (Blumenthal v. United States, 332 U.S. 539, 559, 92 L.Ed. 154, 169), all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore and Ohio Railroad Co., 167 Fed.2d 54."

This becomes more gross when taken in the light of the facts that the trial herein involved spanned more than four months and the transcript was more than 7,500 pages, not to mention the detail and amount of exhibits that were presented on either side.

Man is not like a computer; he cannot be programmed to retain and reject certain facts when all the material is given to him at one time. Once a word is spoken to him his imagination and prejudices play upon it until his mind's eye has conjured up a picture, even though he may not have understood the context or meaning of the word when originally spoken, and even though he may later be told to disregard the picture he has perceived.

Such ambiguous and imaginative words as "underworld character" and "strong-arm man", etc., are colored to begin with and to allow the jury to be constantly beseiged by them when no basis for their use has been laid, is prejudicial to the Appellant.

Such assertions attack the character and reputation of the Appellant without allowing an adequate avenue of rebuttal, and without his having opened the question to begin with.

Wigmore decries the use of such tactics, asserting what is known to be the general rule:

"For example, the moral disposition of an accused may be probatively of considerable value as indicating the probability

of his doing or not doing a particular act or crime, yet it may be excluded because of the undue prejudice liable to be caused by taking it into consideration; for its probative value may be exaggerated, and condemnation be visited upon him, not for the act, but virtually for his character." (Emphasis ours)

1 Wigmore 29a, p. 412.

The effect of the introduction of this testimony was too clearly to show a proclivity to commit crime and thus blacken, to his prejudice, the character and reputation of the Appellant.

In the present case, the probative value of the evidence was far outweighed by the prejudicial nature thereof. The prosecutor was allowed to crucify the character of the Appellant before he had even put such into question, and was against all authorities on the subject. The end result of this type of tactics is recognized by the following excerpt from Wigmore:

"There is a deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is in the Court."

1 Wigmore 57, p. 456, 1940 Ed.

This was aggravated by the prosecutor's asking Sica concerning the conviction of a felony when, in truth and in fact, it was a misdemeanor, which subject we have fully treated in our Opening Brief, and it has not been answered by the Government. They must have known that

Sica's conviction was a misdemeanor and, contrary to the impression the Government would give concerning this item that the Court treated it lightly, the Court condemned the prosecutor in no uncertain fashion in this language. We direct the Court's attention to the record (RT 5408, 5411), where we moved for a mistrial. The subject is fully treated in our Opening Brief, beginning at page 52. As the Court said:

"I think the prosecutor is to be censured for not having looked up the law. In the law schools they teach you that this matter of impeachment upon a prior conviction of a felony is of such seriousness that you must always be prepared to back it up to the hilt if you ask the question."

See our Opening Brief, p. 57, for a full treatment of this incident.

This subject was treated in the case of People v. Albertson, 145 Pac. 2d 7, 21, where the Court said, dealing with evidence of other offenses:

"In the first place, the collateral offense for which an accused has not been tried tends to prove his inclination towards crime, that is, to render more probable his guilt of the charge under trial, which is an absolute violation of the rule. It does not reflect in any degree upon the intelligence, integrity, or the honesty of purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted

to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge."

Here the prosecution was able to strike a body blow against the Appellants Sica and Dragna by this evidence introduced in its case-in-chief, and prejudice was multiplied by the questions put to Sica, particularly in connection with the misdemeanor conviction. No amount of instructions could cure this error. This situation, (3) we respectfully suggest, requires reversal.

(3)

In the case of Brinegar v. United States, 338 U.S. 160, at 172, the Court said:

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard.

"These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeiture of life, liberty and property."

INCIDENTS WHICH DENIED
SICA A FAIR TRIAL.

(A) The Daly conversations.

There was no connection between Daly and Sica - - part of the conversations between Leonard and Daly were illicit by Leonard deliberately for the purpose of getting some expressions for the recording.

The comment of the attorneys for the Government, namely, "Daly described Leonard's danger in a fine Italian ⁽⁴⁾ hand" (Appellee's Brief, p. 280), has no place in a brief filed by a representative of a Government engaged in a commendable struggle against the forces of race prejudice and discrimination in this country.

(4)

The definition of "fine Italian Hand", as given in BREWER'S DICTIONARY OF PHRASE AND FABLE, is as follows:

"ITALIAN HAND. 'I see his fine Italian hand in this' may be said of a picture in which the beholder can discern the work of a particular artist through certain characteristics of his which appear. Or it may be remarked of an intrigue, in which the characteristics of a particular plotter are apparent. The Italian hand was originally the cancelleresca type of handwriting used by the Apostolic Secretaries, and distinguishable by its grace and fineness from the Gothic styles of Northern Europe."



(B) The Chargin anonymous phone call -
the threat.

The Appellee relies on two cases to sustain its contention that the evidence of the anonymous telephone call to Chargin was admissible. One big difference appears in the fact situations of those cases which distinguish them to the point of inapplicability.

In People v. Vitusky, 155 App.Div. 139, 152-153, 140 N.Y.Supp. 24, 29 (1st Dept. 1913), from which the Government quotes extensively, there was an actual threat communicated by the defendant and within 36 hours thereof the event he threatened took place. The Court allowed the threat to be shown because of the surrounding circumstances and the fact that the event which took place was the actual one threatened.

In the present case, the only evidence adduced by the prosecution as a basis for entering the phone call was the fact that the Appellant had asked Dros when Chargin was arriving in town. He had been friendly with Chargin before and knew where to reach him in Oakland, because they had had previous business contact.

As a general rule, telephone conversations are exceptions to the hearsay rule and their entrance into evidence can only be allowed where a proper foundation is laid and the caller's voice has been identified.

In the present case, the prosecution seeks to

attribute the responsibility for the anonymous phone call to Chargin to Appellant Sica without complying with these requirements. The well established case law is against such practice.

See Rueckheim Bros. and Eckstein v. SerVis Ice Cream and Candy Co., (1909), 146 Ill. App. 607, where an attempt was made to prove three sales contracts by telephone conversations. The Court held, inter alia, it was error to permit conversation between witness and some unknown person, without in any way connecting such unknown person with the defendant, no such proof being offered to show that such person was authorized by or connected with the defendant.

In a note in 71 A.L.R. 7,60, examples of excluded evidence in criminal cases where there has been no tie-up with the defendant are given. This article is cited in State v. Silverman, 148 Ore. 296, 36 Pac. 2d 342:

"Communications through the medium of the telephone may be shown in the same manner, and with like effect, as a conversation had between individuals face to face. But the identity of the party against whom the conversation is sought to be admitted must be established by some testimony, either direct or circumstantial."

Also cited in 105 A.L.R. 326, 328, quoting from 1 R.C.L. 477.

The authors of 20 Am.Jur.Evi. 365, at 366, state the position of the law today as:

"To hold one responsible for statements and answers made over the telephone by



unidentified persons would open the door for fraud and imposition."

As to the threat itself, the law seems to be:

"But where there is no evidence connecting the defendant with the threats, such proof is inadmissible."

20 Am.Jur.Evi. 289, and 62 A.L.R. 133, 136.

(C) The Leonard-Stanley incident.

The zeal of counsel for the Appellee in defending Leonard is only equalled by their attack on Sica and Stanley -- Stanley, who had the courage to expose Leonard for what he really is. Remember, Leonard never reported the visit of his wife and his conversations with Palermo, and his discussions with Stanley about attempting to get the money his wife had sought from Palermo for the purpose of leaving the country until months after these incidents had occurred. He never reported - remember this - until shortly before the trial, and then no statements were taken from him.

Counsel for the Government said:

- (1) "Sica must suffer the consequences of vouching for a corrupt accomplice."

(Appellee's Brief, p. 292)

- (2) Referring to Stanley, "His role as a criminal emissary of Sica . . ."

(Appellee's Brief, p. 282)

(3) "Leonard exposed Stanley's attempt to corrupt Leonard in a proposition to pay Leonard to leave the country." (Appellee's Brief, pp.269,290)

None of such accusations were supported by the record. They are but deductions which counsel would seek to make and have this Court draw.

It should be borne in mind that Leonard's wife approached Palermo for \$25,000.00 (RT 1265). At that time Leonard admitted he was willing to go to Philadelphia, willing to accept the \$25,000.00 from Palermo, and he had talked to his wife about the money offer which he had solicited.

Leonard's only explanation is, "At that time I would have accepted anything I could get . . . I was destitute and scared to death. . ." Leonard had that very day talked with his wife about "25 big ones", meaning \$25,000.00.

If Leonard's wife did not approach Palermo and seek to get the \$25,000.00 for herself and husband, why did the Government fail to call Mrs. Leonard and permit her to deny this?

Leonard asked Stanley to contact Sica for one purpose only - - to see if he could get him to assist in getting the money his wife had solicited. Sica never once approached Leonard on this money matter. This was a plain, unadulterated "shake down" attempt on Leonard's

part.

Little has been said about Joey Dorando, a boxer who was acquainted with both Sica and who had boxed for Leonard. His relations were friendly with both Leonard and Sica, and in January, 1960, he went to Leonard, at the Gossett-Ames Agency, and there negotiated for the purchase of a car. While he was there, Leonard asked Joey Dorando if he would see Sica and ask Sica to come and see him, in these words, "Tell him to come here and see me." Dorando replied that Sica only came into the cafe for dinner (RT 2997). (Dorando's father operated a well known eating place on Vine Street, in the heart of Hollywood.)

Leonard's testimony was shown to be full of falsehoods.

As was said in Mesarosh v. United States, 352 U.S. 1, 9 L.Ed. 1, 77 Sup.Ct. 1:

"Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a Federal criminal case, and this Court has supervisory jurisdiction over the proceedings of Federal Courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."



CONCLUSION

For the reasons stated, we respectfully pray
that the orders appealed from be reversed.

Respectfully submitted,

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Appellant, Joseph Sica

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Of Counsel.



No. 17781 ✓
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ISADORE SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 17781
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ISADORE SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

This is an appeal from an order of the United States District Court for the Southern District of California, Southern Division, dated January 22, 1960, finding Appellant mentally competent to understand the proceedings against him at his previous trial in 1956 and to properly assist in his own defense at that time.

The jurisdiction of the District Court is founded upon Section 3231, Title 18, United States Code. Appellant's petition to vacate the judgment of conviction following his trial in 1956 was made under Section 2255, Title 28, United States Code. This Court has jurisdiction to entertain this appeal and review the order under Sections 1291 and 1294 of Title 28, United States Code.

II.

Statement of the Case.

On July 12, 1956, Appellant was found guilty in the United States District Court, Southern District of California, Southern Division, on all counts of an indictment charging violations of Title 18, United States Code, Section 545 and Title 26, United States Code, Section 4755. On July 26, 1956, the Honorable James M. Carter, District Judge before whom the case was tried, sentenced Appellant to a term of five years on Count One of the indictment and imposed a fine of \$5,000.00. On Count Two of the indictment Appellant was sentenced to a term of five years to run consecutively to the sentence on Count One and fined \$1.00. On Count Three of the indictment Appellant was sentenced to a term of five years and fined \$1.00, said five year term to run concurrently with the sentence imposed on Count Two. On September 4, 1956, the judgment was modified in that the execution of sentence on Count Three only was suspended and the defendant was placed on probation for a period of five years to commence upon completion of the sentence imposed on Counts 1 and 2. This modification was later set aside on November 19, 1959. [R. T. 34-38].*

On October 7, 1957, Appellant filed a motion to set aside and vacate the sentence under Section 2255, Title 28, on the ground that he was insane at the time of arraignment, trial and sentence. On October 25, 1957,

*R. T. refers to Reporter's Transcript of Proceedings.

an order was made by the District Court denying the motion to vacate sentence. A notice of appeal from this decision was filed by Appellant on November 26, 1957, and on January 20, 1958, this Court allowed Appellant to proceed *in forma pauperis*.

The order of October 25, 1957, was considered by this Court on March 10, 1959, in case No. 15908, Smith v. United States, 267 F. 2d 210, which held that Appellant was entitled to a hearing on his allegation that he was insane at the time of arraignment, trial and sentence. The District Court, after appointing two psychiatrists, held such a hearing on November 19, 20 and December 3, 1959, which was attended by Appellant and his two appointed counsel. Following the hearing at which extensive medical testimony was given by a psychiatrist of Appellant's own choice [R. T. 15], the District Court rendered its judgment (attached hereto as Appendix A), dated January 22, 1960, denying the motion to vacate the judgment in case 26007-Cr., Southern Division. Appellant filed a notice of appeal from this judgment on March 24, 1960, which this court considered by its order signed February 28, 1962, as having been timely filed. Appellant filed a brief dated August 27, 1962.

III.

Question Presented.

This Court in its order of February 28, 1962, has specified the sole issue on appeal as follows:

“ . . . whether there was substantial evidence before the court to support the trial court’s findings that at the time of the prior criminal proceedings against the petitioner, by which he was convicted, he was mentally competent to understand the proceedings against him and to properly assist in his own defense.”

IV.

Statement of Facts.

Appellant’s Case:

Appellant testified that he was discharged from the United States Navy about 1945 for a mental disorder. He worked for a transit company, operating a street car in Los Angeles, California, from about 1945 until the latter part of 1948. He testified that during this period he experienced a constantly grinding type of noise which annoyed him, followed by a set of voices which grew progressively worse around 1948. He said he had suffered a mental black out and had an accident while operating a street car and thereafter resigned from the transit company. [R. T. 91-97].

Smith testified that the condition grew worse until he believed he was being followed and that his or his wife’s life would be taken. After leaving the traffic company he went to barber school about 1948 and com-

menced working as a barber around 1949 or 1950, later owning his own barber shop about 1953. During the period between 1951 until 1956 he stated he had to quit work at times due to his ailment but during this period when he did work he worked as a barber. [R. T. 103-106].

Appellant testified further he still had the same condition in 1956 "that my life would be taken and there was a leader of a mob and I was supposed to follow the command." He stated that the condition had gotten worse to the extent "that the contour of people's faces were changing to the image of a hard mobster, and when fear would flare in me that it wouldn't be long before my life would be taken." [R. T. 107-108]. He testified this happened at the time "that I was approached to go to Tijuana, Mexico by Royal Lishey." [R. T. 108]. He stated he told Lishey that he wasn't up to going to Tijuana, but when Cain, who with Lishey was a codefendant in the original criminal case, came into the barber shop, Cain's image changed to a mobster and Smith determined he had better do what the "guy" wanted him to do. [R. T. 110]. He testified that he proceeded to go down to Tijuana with Lishey and Simmons, and Cain and Iles went in their car. [R. T. 111]. At this time he stated he felt this whole group were a part of a gang out to get him and if he didn't comply with anything asked of him, his wife and Simmons, who was a juvenile, would be killed. [R. T. 108, 120]. He didn't tell his attorney about these

images because "I figured Mr. Curzon and Mrs. Smith both were trying to have me locked up in a mental hospital." [R. T. 120].

He testified further that at different times the faces of the United States Attorney, the United States Marshal and a witness named Peet, respectively, turned into that of a mobster out to get him [R. T. 118, 119], but he didn't tell Mr. Curzon about this because he had a fear that Curzon and his wife were going to have him locked up. [R. T. 124].

On cross-examination he stated with respect to an examination, Exhibit 12A, given him on February 27, 1956, in which it was found by a Veteran's Administration board of two neuropsychiatrists that he was sane and competent, that he did not give considerable background as to disabilities because he did not trust them. [R. T. 138].

The testimony of both Lishey and Cain that it was Smith who asked them to go to Tijuana was called to Smith's attention and he claimed that Cain and Lishey conspired against him. [R. T. 139, 140]. He did not recall the testimony of a third witness, Iles, at the trial to the effect that Smith also asked Iles to go to Mexico. [R. T. 140]. He admitted having given information to the Veterans Administration doctors concerning his mental conditions at the various times, including the examination on February 27, 1956, but stated there were some things he hadn't told them. [R. T. 137, 138-143].

On redirect examination he stated he believed he had a 50 to 80 per cent disability rating by the Veterans Administration at the time of his arrest in 1956.

Mrs. Willie M. Smith, the wife of Isadore Smith testified that she found that his behavior was peculiar at the time he came out of the service in 1945. [R. T. 147, 148].

Mrs. Smith stated that during a period in 1945 her husband had threatened to commit suicide; that thereafter following his discharge from the Navy he had blackouts and nightmares; that he would disappear from his home and not come home for three or four days at a time; that he would tell her fantastic stories, and that this continued up until the trial. [R. T. 146-152]. She said appellant did not tell her about looking into faces and seeing a mobster's face "after he decided his attorney and I were . . . conspiring to send him to a mental hospital." [R. T. 153]. Mrs. Smith testified further that during the trial her husband pointed out a man as following them and that he wouldn't stay in San Diego but returned at night to Los Angeles to sleep during the trial. [R. T. 155-157]. During this entire period until 1956 she often went with appellant to the Veterans Administration where he received out-patient treatment. [R. T. 160].

Appellee's Case:

Harry D. Steward, who represented the United States as Assistant United States Attorney during the criminal proceedings in the case of United States v. Isa-

dore Smith, No. 26007-SD, in 1956, testified that he observed Smith on the stand at said trial and the various stages of said proceedings and in his opinion appellant was mentally competent to understand the proceedings against him and to properly assist in his own defense. At no time during said trial proceedings did Steward cause in behalf of the United States Attorney a motion to be filed for a judicial determination of the mental competency of appellant under Section 4244, Title 18, United States Code. [R. T. 48-53].

Myron Curzon, the attorney representing appellant during said criminal proceedings, testified (after appellant waived the attorney-client privilege) that he was aware of the mental background of Smith, that Smith cooperated with him and assisted in the defense of the charge and that the mental condition of appellant was not such as to warrant raising the issue of mental incompetency of Smith as a defense to the charge or as a basis for an application for a judicial determination of the mental competency of Smith under Section 4244, Title 18, United States Code. [R. T. 53-65].

On cross-examination Curzon testified that Smith was quite competent in everything he said or did except that he did not know whether a statement Smith had made on the witness stand was irrational or another lie which was not a "smart" lie when Smith testified that he had never seen a Government witness, Peet, before the trial and added that the witness had been following him around during the trial. [R. T. 67, 68].

Mrs. Eleanor Saggese, San Diego County Deputy Sheriff, produced official records of the San Diego County Jail reflecting that Smith was examined by a physician when received there on June 4, 1956, and that during the criminal proceedings in 1956, certain medical treatment was prescribed for Smith on July 12, 15, 16, 18, 27; August 1, 6, 11, 25; September 12, 1956, but at no time during aforesaid period was any psychiatric or mental examination prescribed. [R. T. 76-87; Ex. 13, 14].

Court's Witnesses:

Dr. John D. Robuck, a physician duly qualified by education and experience to determine appellant's mental competency, reviewed all the exhibits including appellant's Veterans Administration file, C-5-169-892 [Exs. 1 and 12], and the Federal Institutions' medical reports [Ex. 2, 3, 4, 7, 8, 9, 10, 11], reviewed the testimony including that of appellant in the criminal proceedings in 1956, was present in court and heard all of the testimony at this Section 2255 hearing, observed Smith during said hearing and at a prior examination on July 8, 1959. Dr. Robuck testified that the petitioner had been mentally ill during the period of time referred to in 1956, but not sufficiently so to prevent his understanding the nature of the offense and to prevent his proper cooperation with counsel. Dr. Robuck placed the illness of defendant in the category of a schizophrenic reaction, paranoid type, with a qualification that said period in 1956 was a period of remission.

Pertinent parts of Dr. Robuck's testimony are attached hereto as Appendix B.

Dr. M. Brent Campbell, a physician duly qualified by education and experience to determine appellant's mental competency, and appointed as an additional Court witness also examined appellant in the presence of Dr. John D. Robuck on July 8, 1959. Both Dr. Campbell and Dr. Robuck found by written reports to the Court, filed herein as Exhibits 5 and 6, respectively, that appellant was mentally competent to understand said Section 2255 proceedings and to properly assist in prosecuting the same.

V.

Argument.

The burden of proof in a Section 2255, Title 28, proceeding is upon the petitioner. *United States v. Trumbly* (7th Cir., 1956), 234 F. 2d 273, 274, cert. den. 352 U. S. 931. The cases also hold that on direct appeals a conviction should be sustained if there is substantial evidence, taking the view most favorable to the Government to support it; and in considering the facts, the reviewing court must grant every reasonable intendment in favor of appellee. *United States v. Glasser*, 315 U. S. 60, 80 (1942). *Arena v. United States*, 225 F. 2d 227, 229 (9th Cir., 1956), cert. den. 350 U. S. 954 (1956).

In any event, the appellee contends the evidence adduced at the within hearing under Section 2255 amply supports the trial court finding that the appellant was

mentally competent to understand the charges of illegally importing and concealing marihuana and to properly assist in his own defense. Dr. Robuck's testimony to that effect is not disputed by any competent medical testimony. Before arriving at this conclusion Dr. Robuck had personally examined appellant on one previous occasion; and had before him the entire medical record of the Veterans Administration concerning Smith as well as the finding of the Director of Prisons [Ex. 7], to the effect that there was no cause for making a certificate under Section 4245 of Title 18 that there was a possible undisclosed incompetency existing in this case during trial.

Dr. Robuck also heard all the testimony presented on both sides during the Section 2255 proceeding as well as observing appellant and hearing his testimony. In addition to examining all of the pertinent medical records regarding appellant, Dr. Robuck also reviewed the Reporter's Transcript [Ex. 15] of the trial which resulted in Smith's conviction in 1956.

A brief summary of the evidence at said trial reflects that Smith was one of five men, the others being, Lish-ey, Simmons, Iles, and Cain, who went to Tijuana [at the instance of Smith—pp. 85, 203, 456 of Exhibit 15; R. T. 139-148], in the early morning of April 26, 1956, in Smith's 1955 Chrysler and Iles' 1951 Plymouth. At Tijuana, Baja California, Mexico, three sacks containing about seven pounds of marihuana were obtained and placed in said Plymouth which was then driven into the United States later that day by Cain and Iles. Cain and

Iles testified that Smith while in Mexico transferred the bags of marihuana from his Chrysler to the Plymouth and that said Chrysler entered the United States from Mexico with Smith therein just before the Plymouth entered. [Pp. 105, 108, 221 of Ex. 15]. Appellant testified in defense that he had gone to Tijuana at the suggestion of Lishey with Lishey and Simmons in his Chrysler on April 26, but that at no time during this trip had he seen the 1951 Plymouth in which Iles and Cain were riding. [Pp. 336, 345 of Ex. 15].

In rebuttal the Government impeached Smith by a disinterested service station attendant named Gilbert Peet, who placed Smith at a Standard station in Del Mar, California, in his Chrysler together with the 1951 Plymouth, where Smith paid for gas which was placed in said Plymouth, at a much earlier time than Smith claimed he had passed through that area. [Pp. 421, 489-504 of Ex. 15]. Appellant in surrebuttal denied that he had ever seen this witness before the trial adding that the witness had been following him around for two or three days, a fact which has been emphasized by appellant as demonstrating his irrationality.

The denial by appellant that he had never seen Peet before the trial was a falsehood according to Peet's testimony. The verdict of the jury also found false Smith's denial that he had not seen the 1951 Plymouth in Tijuana. Peet's testimony rendered Smith's falsehoods much less effective than they heretofore had been against the accomplice testimony of Cain and Iles. Appellant's defense counsel himself to counter Peet's testi-

mony had immediately before Smith's surrebuttal testimony attempted to discredit Peet by referring to seeing Peet in the elevator the night before his testimony and attempting to show that Peet had received a "deal" from the government. [Pp. 500-506 of Ex. 15.] The fact that appellant added what may be fairly characterized as not a "smart lie" from the defense standpoint in an attempt to further discredit Peet, or for some other purpose, cannot properly be construed as disestablishing the clear testimony by appellant to questions directed to him throughout the trial.

Assuming *arguendo* a single irrational statement by appellant during his entire testimony, this of course does not of itself establish a lack of understanding of the type which prevented appellant from appreciating the nature of the proceedings and rendered him unable to aid properly in his defense thereof. As stated in *Smith v. United States, supra*, at page 211 the existence of some form of insanity by medical tests is not sufficient.

This court in the case of *Isadore Smith v. United States, supra*, at pages 210, 211 stated further:

"Here defendant Smith did not urge insanity as a defense to the crime. Inasmuch as he was convicted of offenses relating to narcotics, the reason for this is not far removed. It strikes the casual observer that trafficking in marijuana is hardly the occupation that most insane persons are impelled to engage in by virtue of their disability. Of course, it might be possible in an isolated instance."

The evidence in this case demonstrates that here, however, was not such an isolated incident. The trip itself

to Mexico for marijuana was so well planned and executed by Smith, a prime offender that he passed through the port of entry without detection. Furthermore, to paraphrase Dr. Robuck at [R. T. 208], if appellant had been ill to the degree that he described himself as being in his testimony he could not have “put together or maintained as coherent and well-constructed a story as he presented in his original testimony.” The appellant having failed in a well thought out and ingeniously contrived defense to the original charge, has not shown that he is entitled to a “second bite at the apple.” On the contrary, appellee United States has presented substantial evidence supporting the trial court’s finding that appellant was mentally competent to understand the proceedings and to assist in his defense of the offense in 1956.

VI.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the District Court’s ruling denying appellant’s motion after a full hearing was entirely correct on the basis of the evidence in this cause.

Wherefore, appellee respectfully prays that the appeal be denied.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
*Assistant U. S. Attorney,
Chief, Criminal Section,*

ELMER ENSTROM, JR.,
*Assistant U. S. Attorney,
Attorneys for Appellee,
United State of America.*

—15—

No. 17781

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ISADORE SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Ruled 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANCES C. WHELAN,

United States Attorney,

THOMAS R. SHERIDAN,

Assistant United States Attorney,

Chief, Criminal Section,

ELMER ENSTROM, JR.,

Assistant United States Attorney,

Attorneys for Appellee,

United States of America.

APPENDIX A.

Findings of Fact, Conclusions of Law and Judgment.

In the United States District Court, in and for the Southern District of California, Southern Division.

Isadore Smith, Petitioner, vs. United States of America, Respondent.

The above matter came on for trial on November 19, 20 and December 3, 1959, before the Honorable James M. Carter, United States District Judge. The Petitioner appeared in person and by his appointed counsel, Robert Ward, Esquire, and Max Lercher, Esquire, and the Respondent appeared by counsel, Laughlin E. Waters, United States Attorney, Robert John Jensen, Assistant United States Attorney, Chief, Criminal Division, and Elmer Enstrom, Jr., Assistant United States Attorney, and evidence both oral and documentary was introduced on behalf of both parties and the Court having fully considered the same and heard the arguments of counsel and being fully advised, makes the following findings:

I

That the Petitioner is in custody of the Attorney General by reason of his conviction in this Court of the offenses of illegal importation and concealment of marihuana, in violation of United States Code, Title 18, Section 545 and importation of marihuana without payment of tax, in violation of United States Code, Title 26, Section 4755 as charged in three counts of Indictment No. 26007 Cr., Southern Division, wherein he was sentenced on July 26, 1956, to imprisonment for a period of five years and fined \$5,000.00 on Count

One, and five years and a fine of \$1.00 on Count Two to run consecutively to sentence on Count One, and five years and a fine of \$1.00 on Count Three, sentence as to imprisonment on Count Three to run concurrently with sentence on Count Two.

II

This is a proceeding by Petitioner under United States Code, Title 28, Section 2255, to vacate the foregoing judgment and this Court has jurisdiction thereof by virtue of said section; and the issue raised thereby as determined by the pretrial stipulation and order is as follows:

Whether at the time of the prior aforesaid criminal trial proceedings, including arraignment dated June 4, 1956, trial dated July 10, 11, 12, 1956, and sentence July 26, 1956, Smith was mentally competent to understand and the proceedings against him and properly assist in his own defense.

III

That the Petitioner was represented at all times during the foregoing criminal proceedings by his counsel, Myron W. Curzon, who has testified at this hearing that he was aware of the mental background of Petitioner, that Petitioner cooperated with him and assisted in the defense of the charge, and that the mental condition of Petitioner was not such as to warrant raising the issue of mental incompetency of Petitioner as a defense to the charge or as a basis for an application for a judicial determination of the mental competency of Petitioner under United States Code, Title 18, Section 4244; and the Court finds that Petitioner was effectively represented in said criminal proceedings and that the issue of the mental incompetency

of Petitioner was not raised as a defense or as a basis for an application under aforesaid Section 4244, United States Code, Title 18, in said criminal proceedings.

IV

That the respondent was represented by Harry D. Steward, Assistant United States Attorney, during the foregoing criminal proceedings and he has testified herein that he observed Petitioner on the stand at the trial and the various stages of the said proceedings and that in his opinion Petitioner was mentally competent to understand the proceedings against him and to properly assist in his own defense and the Court finds that at no time during aforesaid proceedings did the United States Attorney file a motion for a judicial determination of the mental competency of Petitioner under United States Code, Title 18, Section 4244 in said prior criminal proceedings.

V

That the Acting Director of the Bureau of Prisons has testified by affidavit that the Director of the Bureau of Prisons did not find probable cause to believe that Petitioner was mentally incompetent at the time of his trial and, therefore, had no basis to make a certification under United States Code, Title 18, Section 4245 to the effect that there was probable cause to believe that Petitioner was mentally incompetent at the time of his trial and the Court finds that such a certificate was not made.

VI

That the Petitioner was examined by a physician of the San Diego County Jail when received there on June 4, 1956, and during said prior criminal proceedings

that certain medical treatment for Petitioner was prescribed on the following dates: July 12, 15, 16, 18, 27; August 1, 6, 11, 25; September 12, 1956, but at no time during aforesaid period was any psychiatric or mental examination prescribed.

VII

That there have been received in evidence all available medical reports concerning Petitioner, including his Veterans Administration file, C-5-169-892, and the Federal Institutions' medical reports and the testimony of Petitioner and his wife, Mrs. Willie Smith.

VIII

That Dr. John D. Robuck, physician duly qualified by education and experience to determine Petitioner's mental competency, was appointed herein as the Court's expert witness and has reviewed all exhibits including the foregoing medical records and the testimony, including that of Petitioner, at the prior criminal proceedings, and was present in Court and heard all of the testimony at this proceedings; observed Petitioner during this trial and at a prior examination on July 8, 1959, and testified, and the Court now so finds in accordance with his opinion, that the Petitioner has been mentally ill during the period of time referred to in 1956, but not sufficiently so to prevent his understanding the nature of the offense and to prevent his proper cooperation with counsel. That his illness would be placed in the category of a schizophrenic reaction, paranoid type, with a qualification that the period in 1956 was a period of remission.

IX

That Dr. M. Brent Campbell, a physician duly qualified by education to determine Petitioner's mental

competency, was appointed as an expert witness and also examined Petitioner in the presence of Dr. John D. Robuck on July 8, 1959, and both he and Dr. Robuck found by written report to the Court, and filed herein, that at that time Petitioner was mentally competent to understand the instant proceedings and to properly assist in prosecuting the same; and the Court further finds in accordance with said opinions and the opinion of Dr. Robuck at this trial on November 19, 20 and December 3, 1959, the Petitioner was mentally competent to understand said trial proceedings and properly assist in prosecuting the same; that Petitioner though suffering from mental illness, is presently legally sane.

WHEREFORE, THIS COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

I

That at the time of the prior criminal trial proceedings, including arraignment dated June 4, 1956, trial dated July 10, 11, 12, 1956, and sentence July 26, 1956, and at this trial on November 19, 20 and December 3, 1959, Petitioner was mentally competent to understand the proceedings against him and properly assist in his own defense. That presently the Petitioner, though mentally ill, is legally sane.

II

That the motion of Petitioner to vacate the judgment and sentence dated July 26, 1956, in said prior criminal trial proceeding, No. 26007-Cr should be denied.

The Court recommends that Petitioner be immediately paroled and given treatment by the Veterans Administration as an "in" or "out" patient.

Judgment.

IT IS THE JUDGMENT OF THIS COURT that the motion of Petitioner, Isadore Smith, to vacate the judgment, sentence and commitment in case No. 26007-Cr. be, and the same is, hereby denied.

Dated: January 22, 1960.

JAMES M. CARTER,

United States District Judge.

APPENDIX B.

The following excerpts are taken from the Reporter's Transcript of Dr. Robuck's testimony, November 20, 1959, at the following pages:

Examination by Judge Carter at pages 166 to 174, inclusive:

Q. You examined Isadore Smith for the first time when, if you recall? A. As I recall the date, it was July 8, 1959.

Q. Have you examined him on any other occasion since that time? A. Not directly; only by observation in the courtroom yesterday.

Q. You heard all the proceedings in court yesterday. A. Yes, sir, I did.

Q. And you inspected the file of the Veterans Administration? A. Yes, sir.

Q. Which is Exhibit 12, including the parts selected by Counsel which were marked Exhibit 12-A and Exhibit 12-B? A. Yes, sir.

Q. Did you inspect the file in the criminal case in which he had been convicted in 1956? A. Yes, sir.

Q. Did you read all or part of the transcript of that trial? A. I did.

Q. What did you read? A. As far as I can recall, I read practically all of it.

Q. The testimony? A. Yes, sir.

Q. And you read all of the testimony of the petitioner Smith? A. Yes, I did.

Q. That prior trial started with an arrest on June 2, there was an arraignment in court on June 4, 1956,

the defendant was tried on July 10, 11 and 12, 1956, and he was sentenced on July 26, 1956, as I recall the dates.

Do you now have an opinion as to whether or not, during that period of time from June 2, 1956, the date of arrest, to July 26, 1956, the petitioner Isadore Smith was mentally competent to understand the proceedings against him and properly to assist in his own defense? Do you have such opinion? A. Yes, sir.

Mr. Enstrom: If your Honor please, would you add—I think the Doctor has in mind the charge of illegally bringing marijuana into the United States.

The Court: Yes, I will add to the question: Having in mind the charge in the prior criminal case, one Count of which was importing marijuana, on which he was sentenced, and the second Count of which was illegally facilitating, transporting and concealing of marijuana after importation, do you now have an opinion as to whether or not the petitioner Isadore Smith was mentally competent to understand the proceedings against him and properly to assist in his own defense and cooperate with counsel? Answer yes or no.

The Witness: Yes, sir, I do.

The Court: What is your opinion? And what are your reasons therefor?

The Witness: It was my opinion that he was able to understand the nature of the proceedings against him at that time and to participate in his own defense. And if I may, I have jotted down some of the points that, it seemed to me, had a bearing on this. I would like to mention those. I will try to place these, to some degree, in chronologic order in order that they may present a coherent picture.

First, Mr. Smith's behavior immediately prior to the trial and prior to the commission of his act apparently had been reasonably satisfactory to the people who shared the community with him. As I recall from the trial testimony, there was evidence to the effect that he was a person who was easy to meet, who was apparently well accepted and well liked by the individuals who so testified.

Second, he has been examined, not very many months previous, by the Veterans Administration's physicians, and it was thought at that time, according to their report, that his evidence of mental illness was apparently no greater than it had been over the previous few months or previous year or two.

I will point out here that, apparently, some five years before he had been considered quite ill, and I think had his condition worsened from the state described, I believe, by Dr. Clark in late 1951, he would undoubtedly have deteriorated in his behavior to the point that he would have been confined to a hospital. This did not happen. He managed, instead, to establish himself in a business and to function at least to the degree of making a living in that business.

In the multiple examinations and inquiries that had been made of him there is little, if any record of the history of these delusions and hallucinatory experiences which he described to us yesterday. This, I think, in my experience would not be consistent with the behavior of a person who was plagued by delusions or hallucinations, because in general these thoughts and ideas cannot be contained and are usually reacted to or are expressed to other people, particularly when other people ask directly about them. Lay people very often

are quite well aware of an abnormality of this kind in an individual troubled to the degree that Mr. Smith indicated that he felt that he was. He stated repeatedly that he had feared that his wife would be killed as a part of this plot against him, and yet at the same time he indicated that there were also feelings on his part that she was a part of the plot. This is inconsistent, in my experience, with a delusional thinking, in which a person is seldom assigned a dual role by their being a part of the plot and victim of the plot. Consequently, I don't think this was a likely situation.

In my interview with Mr. Smith on July 8 of this year, he informed me that he was angry at his attorney and did not have trust in his attorney and offered at that time that the reason that this occurred was that his attorney would not raise the question of his health. Later in the same interview he told me that he had some fear of being locked up as being insane. I did not catch this inconsistency at the time. But perhaps this can be developed later.

In the evidence as related in the transcript and in the testimony yesterday, Mr. Smith's attorney at the time of the trial did apparently not make any claim that Mr. Smith could not assist in his own defense and proceeded with his responsibility as Mr. Smith's attorney without dissatisfaction with Mr. Smith's ability to participate with him. Further, Mr. Smith, I think, seemed to demonstrate that his mental health was such that he could assist in his own defense, as indicated in the testimony in regard to bringing one of the witnesses to the attorney's home to make a statement regarding the case, which would have been in Mr. Smith's defense.

The question of Mr. Smith's mental state, as far as its being a defense for his behavior, was not raised by his attorney, and he indicated yesterday that apparently it was not a serious enough question that he felt it was something that should be raised.

As I read the description of Mr. Smith's behavior during the trial, as exhibited by the reactions of other people to him, and the comments that he made in direct testimony, his behavior and comments did not seem to raise the question of his mental health in the mind of any of the viewers, with the possible exception of the one statement that was discussed yesterday where he commented about Mr. Peet following him around. His account of himself as he described his behavior in the course of his testimony presented a fairly consistent, well-knit picture which, I think, would not have been the production of a person who was as mentally disturbed as Mr. Smith indicated to us that he felt he was at that time.

I think the incident in which Mr. Smith described seeing the vision of Mr. Peet—and I think he referred to that as the "image" of Mr. Peet, his face—in Mr. Smith's testimony yesterday, was the only time that he mentioned his delusions or hallucinations to any other person. This apparently was in the courtroom, and was to his wife, when he indicated that Mr. Peet was present in the restaurant with him at lunch that day. And this was near the end of his trial. This, in my mind, could have been either a deliberately false statement laying the foundation for this appeal, or it may have been a transient break with reality which was unlike his apparent condition during the remainder of the proceedings that were described in the transcript.

Mr. Smith did not claim to anyone, apparently, that he had been convicted while mentally ill until somewhat after the acute episode of mental illness which occurred after he had been imprisoned. I did not understand this delay. He indicated that he wanted to relate this to the Judge—I think this was immediately prior to sentencing—but that he did not have this opportunity. I do not know why he did not relate this to another person who, he felt, would inform the Judge, or why he did not write a letter directly to the Judge, since he had written other letters to the Judge and had evidence that those had been delivered and examined.

I think that had he been delusional and hallucinated during his trial, and if his account of his behavior had been based on his delusional or hallucinated state, it would seem unlikely to me that a person with this degree of mental illness would then abandon this account, as Mr. Smith is said to have done, and to have said that it was a lie. I think in order for the story to have been presented as it was, and to have it accepted as an extension of his mental illness or a projection of his mental illness, that we would have to say that it would probably not be abandoned abruptly when it had apparently served its purpose.

The somewhat broader view of the testimony I am giving, then. I think his history has indicated that Mr. Smith has been chronically ill mentally for many years. I think he was especially ill in 1951, as indicated by the Veterans Administration records, and certainly again in 1956 and part of 1957 when he was hospitalized after his sentence.

The description of Mr. Smith—his activities, his social behavior, the medical examinations prior to the

act, etc.—did not suggest to me that he was particularly disturbed mentally at the time of the act or at the time of his trial, and on this basis I rest my opinion that he was able to understand the nature of the proceedings against him and that he was able to participate in his own defense.

The Court: I have just one question, and then you may examine.

In other words, our inquiry here is whether or not Mr. Smith was competent to understand the nature of the proceedings and to cooperate with his Counsel during this period in 1956.

You are of the opinion that he was mentally ill for some period of time. Would you also say he was mentally ill during that period in 1956, but not sufficiently to prevent his understanding the nature of the offense and his cooperation with Counsel?

The Witness: Yes sir.

The Court: If this were an inquiry, as it were, whether this man was mentally ill period, your answer would be Yes?

The Witness: Yes, sir, it would.

The Court: If the inquiry is, Was he able to understand the nature of the proceedings and to cooperate with Counsel, your answer to that is also Yes?

The Witness: Yes, sir.

Examination by Judge Carter at pages 194, 195:

The Court: Doctor, when I asked you your opinion I did not incorporate the words “with reasonable medical certainty.” Are the opinions you have given here those based upon an inclusion of that phrase “reasonable medical certainty”?

The Court: Now, you say that Mr. Smith was ill in 1956 and is ill today, but that in your opinion both at the time concerned in 1956 and in July of this year he has been able to cooperate with Counsel and to understand the nature of the proceedings involved. Tell us in layman's language what is wrong with Mr. Smith now, and what was probably wrong with him in 1956.

The Witness: Well, I think we would see such things as a tendency to be more suspicious of other people and their motivations than would occur in the average person. There would be a tendency to be over-concerned about detailed matters, that is, almost to the point of losing track of the thread of the conversation or the thread of an idea as he pursued some of the side issues. I think we would see what we would call a blunting of affect, by which we mean that the person doesn't show much emotional response to situations in which some would be expected, and that sometimes when the emotional response does come it is not quite what would be expected, either in quantity or in quality. These are the chief things that we would note.

The Court: Is there a term that you would apply to his condition when you say he is presently ill?

The Witness: Yes, sir. I would think that, were I diagnosing this, I would place it in the category of a schizophrenic reaction, paranoid type, with the qualification in remission.

No. 17783

United States
Court of Appeals
for the Ninth Circuit.

ALCUIN WILLENBRING,

Appellant,

v

UNITED STATES OF AMERICA,

Appellee.

PETITION TO REVIEW A DECISION OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE SOUTHERN DISTRICT
OF CALIFORNIA CENTRAL DIVISION

BRIEF FOR THE PETITIONER

LEONARD B. HANKINS
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No. 17783

United States
Court of Appeals
for the Ninth Circuit.

ALCUIN WILLENBRING,

Appellant,

-VS-

UNITED STATES OF AMERICA,

Appellee.

PETITION TO REVIEW A DECISION OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, CENTRAL DIVISION

JURISDICTION

This appeal by ALCUIN WILLENBRING is taken from a judgment of conviction of the District Court of the United States for the Southern District of California, Central Division (United States of America, Plaintiff v. Alcuin Willenbring, Defendant, No. 29458-CD, indictment filed February 15, 1961), for a violation in two counts of 26 U.S.C. 7201 in that appellant

wilfully attempted to evade and defeat income taxes due the appellee during the years 1954 and 1955.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 2106.

STATEMENT OF CASE

HISTORY OF CASE

An indictment was returned by a Federal Grand Jury against the Appellant on February 15, 1961.

The Appellant voluntarily surrendered himself on May 3, 1961 and was arraigned before the Honorable Harris C. Westover, United States District Judge, on May 15, 1961.

The case was tried before the Honorable Gus Soloman, United States District Judge, commencing on November 21, 1961 and continuing through December 1, 1961, when the jury returned its verdict of guilty as to both counts of the indictment.

Sentence of four years imprisonment on each count to run concurrently and an aggregate fine of \$10,000.00 was rendered on December 8, 1961.

It is from this verdict and sentence that this appeal is taken.

QUESTION PRESENTED

The question presented by this appeal is whether the Honorable Judge, Gus Soloman should have disqualified

himself upon the filing of the Affidavit of Bias by the Appellant under Title 28, Section 144, United States Code.

RESUME OF FACTS

Following the Appellant's indictment on February 15, 1961, he was arraigned before the Honorable Judge Harris C. Westover on May 15, 1961, at which time he entered a plea of not guilty and the Honorable Judge William M. Byrne was assigned to hear the case.

On May 23, 1961, a Motion for Bill of Particulars was filed by Appellant and the hearing was set for June 5, 1961 before Judge Byrne. On said latter date the hearing was continued on oral motion of the Government to June 12, 1961 and further continued to June 26, 1961 on written motion of appellant.

On June 19, 1961, Appellant filed an Amendment to his Motion for Bill of Particulars which was opposed by the Government. After a further continuance, the hearing on this motion and the amendment was had before Judge Byrne on July 10, 1961 at which time the Appellant's motion was granted in part and denied in part. At this same hearing the Appellant's motion for a continuance in order to allow time for inspection by Appellant of the Government's records was granted and the trial was then continued from

July 17, 1961 to November 21, 1961.

The above motions and arguments thereon were all heard by the Honorable Judge William M. Byrne.

On October 9, 1961, by order of the Honorable Peirson M. Hall, Chief Judge of the United States District Court, Southern District of California, Central Division, this case was transferred to the trial calendar of the Honorable Judge Albert Lee Stephens, Jr. This order was duly made and a written copy of same was timely furnished Appellant's attorney.

On November 17, 1961, Appellant's attorney was telephonically advised by the Government's attorney that this case had again been transferred to the Honorable Judge Gus Soloman who had requested the presence of defense counsel at a pre-trial conference on November 18, 1961. When advised that appellant's attorney would be unable to attend a conference on that date due to prior commitments, Judge Soloman immediately came on the telephone and after some discussion ordered said counsel to attend said conference on November 18, 1961.

At the aforesaid pre-trial conference attended by the Government's and Appellant's attorneys, Appellant's attorney, Leonard B. Hankins became suspicious and suspected that the Honorable Judge Soloman had

previously discussed some of the facts in the case with the Government's attorney in the absence of Appellant's attorney.

The pre-trial conference was continued on November 20, 1961 with counsel for both parties and appellant in attendance. During the course of this conference Judge Soloman stated directly to appellant, "You are the one that is going to the penitentiary".
[TR 2 and 3]

Prior to commencement of the trial on November 21, 1961, appellant filed an Affidavit of Bias under 28 U.S.C. 144 and motion that Judge Soloman disqualify himself and the reassignment of the case to Judge Byrne. This affidavit is part of the record for review on this appeal.

Judge Soloman denied the motion and proceeded with the trial. [TR 2 & 3].

Thereafter on December 1, 1961, a verdict of guilty as to both counts of the indictment was returned by the jury and on December 8, 1961, Appellant was sentenced to four years imprisonment on each count to run concurrently and was assessed an aggregate fine of \$10,000.00.

SPECIFICATIONS OF ERRORS

The Trial Court erred in not disqualifying itself pursuant to Appellant's Affidavit of Bias filed under 28 U.S.C. 144.

ARGUMENT

RESUME OF ARGUMENT

The United States District Judge against whom error is claimed herein, was not assigned to instant case until a scant four days, including a Sunday, prior to trial. The facts giving rise to a belief of bias and prejudice were not complete until the day before trial and therefore the filing of the Affidavit of Bias was timely even though filed on the day of trial. The trial court did not take issue with the facts alleged in the affidavit but only concluded said affidavit was insufficient, even though it was accompanied by a certificate of counsel. The code section involved is mandatory on the Trial Court and said Court was therefore in error in refusing to disqualify itself by reason of the Affidavit of Bias filed prior to commencement of the trial under 28 U.S.C. 144.

ARGUMENT

Since this appeal is based directly on a section of the United States Code, it is deemed appropriate

to set forth said section before entering on a discussion of the issues involved. Title 28 U.S.C., Section 144, reads as follows:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. As amended May 24, 1949, C. 139, Section 65, 63 Stat. 99."

The issue as to whether the Trial Court erred in not disqualifying itself can only be resolved by first resolving the following secondary issues:

1. Was Appellant's affidavit timely filed?
2. Was the affidavit sufficient?

3. Does the code section involved create discretion in the Trial Court or is it mandatory as to such judicial officer?

We will consider these secondary issues in the order mentioned.

FIRST: The question of the timeliness of the affidavit is apparent on the face of the record inasmuch as it was not filed until the day of trial. Clearly the code provides for the filing of such affidavits not less than ten days before the beginning of the term "or good cause shall be shown for failure to file it within such time".

In the case of HURD v LETTS, 1945, 152 F2d 121, 80 U.S. App. CD 233, it was held that the rule requiring an affidavit of bias to be filed in advance of trial was inapplicable where facts on which affidavit was based were not known to petitioners and their counsel until after commencement of trial.

Also, in MORRIS v U.S., C.C.A. Okl. 1928, 26 F2d 444, it was held that defendant's application to disqualify judge, filed on day following securing additional information, was not untimely. To the same effect is CHAFIN v U.S., C.C.A. W.Va. 1925 5 F2d 592, certiorari denied 46 S. Ct. 18, 296 U.S. 552.

Instant case was originally assigned to the Honorable William M. Byrne and later, but almost two months prior to the date of trial, was transferred to the Honorable Albert Lee Stephens, Jr. Notice of the further transfer of the case was not afforded Appellant's counsel until only four days prior to the date of the trial.

At that time Appellant's counsel was not acquainted with the Honorable Gus Soloman and had no facts on which to base an affidavit of bias. However, during the course of contact with Judge Soloman, Appellant's attorney became suspicious and suspected that the said Honorable Judge Soloman had been in conference with the Assistant United States Attorney assigned to the case in the absence of Appellant's counsel. This was evidenced by comments of the judge indicating a knowledge of certain facts of the case which could only have come to him from the Government's counsel since same had not been furnished him by Appellant's counsel.

Further, when Appellant's counsel was advised by telephone of the assignment of the case to Judge Soloman and his desire to hold an immediate pre-trial conference, the rapidity with which said Judge came on the telephone indicated to Appellant's counsel that he must have been in the room with the Government counsel.

A conclusion as to the existence of bias on the part of a judicial officer is not arrived at lightly nor hastily. Therefore, the filing of the affidavit of bias was not immediately undertaken although the demeanor of the judge was such as to indicate an antagonism toward Appellant's counsel, if not toward Appellant himself.

It was not until November 20, 1961, the day before the trial was to commence that the appellant believed that a definite bias was indicated on the part of Judge Soloman. At that time during a pre-trial conference in his chambers at which were present the Government's counsel, Appellant and his counsel, the said Judge spoke directly to Appellant saying, "You are the one that is going to the penitentiary". It was at this time that the bias on the part of the Trial Court became apparent.

We submit that the facts indicating bias were not manifested until such a time as to preclude the filing of the affidavit within the time prescribed by the statute and that therefore the affidavit was timely filed within the spirit of the code and such constitutes good cause for filing same on the date of the trial.

Therefore, the refusal of the Trial Court to refuse to disqualify itself on the ground that the affidavit was not timely filed [TR. 11/21/61 P.4] was in error.

SECOND: Regarding the sufficiency of the affidavit filed herein, it was held in BERGER v U.S., 111 1921, 41 S. Ct. 230, 255 U.S. 22, that an affidavit upon information and belief satisfies the provision of this section.

In NATIONS v U.S., C.C.A. Mo. 1926, 14 F2d 507, certiorari denied 47 S. Ct. 243, 273, U.S. 735, the affidavit stated that the defendant was informed and believed that persons connected with the government and having special interest in the prosecution had communicated to the trial judge what they claimed to be facts and circumstances connected with the charge made in the indictment, as a result of which said judge had formed and expressed an opinion that defendant was guilty, which affidavit was accompanied with a proper certificate of counsel, was sufficient under this section, and to require transfer of the cause to another judge.

Bias or prejudice on the part of a judge may exhibit itself prior to trial by acts or statements on his part, or it may appear during trial by reason of actions of judge in conduct of trial, and if it is known to exist before trial it furnishes basis for disqualification of judge to conduct the trial. KNAPP v KINSEY , 232 F2d 458, rehearing denied 235 F2d 129, Certiorari Denied 77 S. Ct. 131, 352 U.S. 892.

Instant case appears to fall clearly within the

purview of the above cited cases. Appellant's affidavit alleged facts upon information and belief showing that the Trial Court had conferred with witnesses, i.e., agents for the Government, prior to the trial; had conferred with Government counsel in the absence of Appellant's counsel; and that the conduct and remarks of the Trial Court made in the presence of Appellant were such as to make Appellant believe that a personal bias or prejudice against him did in fact exist.

Further, the certificate of appellant's counsel accompanied the affidavit thus showing that said affidavit was made in good faith and not for purposes of delay as stated by the Trial Court [TR. 11-21-61 P. 4].

We submit that in cases of this nature the secret attitudes of one's mind, whether he be judicial officer, attorney, defendant or prosecutor, cannot be determined by his mere denial of the existence of an opinion, bias, prejudice or idea [TR. 11-21-61, P.4], but that it must be determined by the acts and conduct of the person which leads others to believe what that attitude may be; that in instant case the Trial Court's acts and oral statements were such as to manifest a closed mind to Appellant's cause and therefore, the Trial Court was in error in not disqualifying himself in accordance with the affidavit filed herein.

THIRD: The duty of the Trial Court appears to be only to pass on the legal sufficiency of an affidavit of bias and certificate of the attorney and not to rule on the motive, truth or falsity of such affidavit.

When a party files an affidavit of a trial judge's disqualification because of personal bias against affiant or in favor of opposite party, the truth of all of the allegations of fact contained therein is admitted and it becomes the duty of the court to determine only its legal sufficiency, and if the affidavit meets the requirements of this section and is accompanied by a certificate of the counsel of record, the presiding judge can proceed no further but is disqualified. MITCHELL v U.S., C.C.A. N.M. 1942, 126 F2d 550, Cert. Denied 62 S. Ct. 1307, 316 U.S. 702, rehearing denied 65 S. Ct. 855, 324 U.S. 887; BERGER v U.S., Supra; SIMMONS v U.S., C.C.A. Tex. 1937, 89 F2d 591, Cert. Denied 58 S. Ct. 19, 302 U.S. 700; NATIONS v U.S. , Supra; LEWIS v U.S. C.C.A. Okl. 1926, 14 F2d 369; CHAFIN v U.S., Supra.

In U.S. v PARKER, D.C. N.J. 1938, 23 F. Supp. 880, it was said that under this section, the accused judge can consider only the legal sufficiency and timeliness of the affidavits of bias and prejudice and is precluded from refusing to recuse himself by an inquiry into or

discovery about the truth of the facts alleged.

Further in MORRIS v U.S., Supra, the rule appears that the trial judge is unauthorized to pass on the good faith of a defendant, filing an affidavit of prejudice.

We submit that in instant case, the comments of the Trial Court were concerned with the good faith of Appellant and not the legal sufficiency of his affidavit [TR. 11/21/61 P.4].

While it is true that some comment was made as to the timeliness of the filing [TR 11/21/61, P.4], yet as stated in the discussion of the first issue, an earlier filing was neither possible nor necessary since the judge herein involved was not assigned to the case until a scant four days prior to trial, one of which was a Sunday.

It is also true that the Trial Court made the statement that the affidavit was insufficient [TR. 11/21/61, P.4]. However, in so stating the court did not state in what manner the affidavit was insufficient nor did he make any comment concerning the alleged facts in ruling on said affidavit.

We therefore submit that Section 144 of Title 28, United States Code, is mandatory and not discretionary with the Trial Court; that instant affidavit was legally sufficient; and that therefore the Trial Court erred in

in not disqualifying himself prior to trial of this case.

WHEREFORE, Appellant respectfully prays that this court reverse the decision of the District Court of the United States.

Respectfully submitted,

LEONARD B. HANKINS

and

JAMES L. HAY

Attorneys for Appellant.

By. S/Leonard B. Hankins

CERTIFICATE OF SERVICE

It is hereby certified that service of three (3) copies of this brief has been made on opposing counsel by mail in accordance with the rules of the United States Court of Appeals for the Ninth Circuit.

Dated: *April* ~~March~~ 2, 1962

S/Leonard B. Hankins

Leonard B. Hankins

No. 17783
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALCUIN WILLENBRING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FRANCIS C. WHELAN, CLERK

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No. 17783
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALCUIN WILLENBRING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

On February 15, 1961, the Federal Grand Jury in and for the Central Division of the Southern District of California returned a two-count indictment charging appellant Alcuin Willenbring with violation of Section 7201 of Title 26, United States Code, for the calendar years 1954 and 1955 [C. T. 2].¹

On December 1, 1961, after trial by jury Alcuin Willenbring was found guilty on each count of the indictment [C. T. 65]. On December 8, 1961, sentence was imposed. Appellant was committed to the custody of the Attorney General for a period of four years on each count, such sentences to run concurrently. Ap-

¹C. T. refers to Clerk's Transcript of Record.

pellant was also fined in the amount of \$5,000 on each of the two counts, a total of \$10,000 [C. T. 69].

The jurisdiction of the United States District Court was predicated upon Sections 3231 of Title 18, United States Code and Section 7201 of Title 26, United States Code. Jurisdiction of this court rests pursuant to Sections 1291 and 1294 of Title 28, United States Code.

II.

STATUTE INVOLVED.

Appellant asserts no error in the trial of his case in the District Court, but alleges as error the failure of the trial judge to disqualify himself upon the filing by Appellant of an affidavit of personal bias pursuant to Section 144 of Title 28, United States Code, which section provides as follows:

“§144. *Bias or prejudice of judge*

“Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

“The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may

file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Section 144 of Title 28, United States Code, is based upon Section 21 of the Judicial Code of the United States, January 1, 1912. Section 21 of the Judicial Code of the United States provides as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

III.

STATEMENT OF THE CASE.

On February 15, 1961, the Federal Grand Jury for the Central Division of the Southern District of California returned a two-count indictment charging appellant Alcuin Willenbring with violations of Section 7201 of Title 26, United States Code, for the calendar years 1954 and 1955 [C. T. 2].

On November 21, 1961, the first day of trial before the Honorable Gus J. Solomon [R. T. 2]² appellant filed a notice and motion for transfer of case for trial back to the Honorable Wm. M. Byrne [C. T. 66]. This motion was based on appellant Alcuin Willenbring's affidavit of bias and his attorney's certificate pursuant to Section 144 of Title 28, United States Code.

The Honorable Gus J. Solomon denied appellant's motion on the grounds that the affidavit on its face showed that it was not timely filed [R. T. 4, lines 9 and 10] and that the affidavit was insufficient [R. T. 4, line 25].

Thereafter appellant was tried by jury, convicted and sentenced [C. T. 69]. Appellant filed a timely notice of appeal [C. T. 70] and here questions the ruling by the Honorable Gus J. Solomon on appellant's affidavit of bias.

²R. T. refers to Reporter's Transcript of Record.

IV.

STATEMENT OF FACTS.

On the morning of November 21, 1961, the first day of his income tax evasion trial, the appellant, Alcuin Willenbring, through his counsel, Leonard B. Hankins, filed with the trial court, Judge Gus J. Solomon, an affidavit of bias [R. T. 2]. The affidavit declared in pertinent part as follows [C. T. 66]:

“2. That upon information and belief, the affiant states as follows: That on February 17, 1961, the United States Attorneys Office called the affiant’s Attorney, Leonard B. Hankins and advised him that the case had just been transferred to the Honorable Gus Solomon, Judge of the District Court for trial; that thereafter the affiant’s attorney has had two conferences with the Honorable Gus Solomon at which agents for the government and the Assistant United States Attorney were present; that further upon information and belief the affiant states that the Honorable Judge Solomon had a conference with the Assistant United States Attorney regarding this case without the affiant’s attorney being present; that further upon information and belief the affiant believes that the Honorable Gus Solomon has already made up his mind that the defendant is guilty without hearing all of the evidence of the case; and that further upon information and belief the affiant states that the Honorable Gus Solomon has a personal bias or prejudice against the affiant and that the said Honorable Gus Solomon should proceed no further therein, but that the matter should be transferred to another judge to hear the proceedings; . . .”

Thereafter in open court the following colloquy took place between Leonard B. Hankins, Esq., and the Honorable Gus J. Solomon:

“Have you anything to say to supplement the affidavit?”

Mr. Hankins: The only thing I would like the record to show, your Honor, is that we have had two conferences, I believe, with your Honor. One last Saturday morning and one Monday at 2:00 o'clock in your chambers, in which the United States Attorney was present, and one on which the defendant was present, that is, on Monday afternoon; that as a result of my discussion with him of what has transpired, and his being present and knowing what has transpired, he feels that he should, under the Code section, file the Affidavit of Bias, under 20 USC 444, and request the court to disqualify itself in this matter.

And as a result of that we have then filed the affidavit of bias and prejudice for Mr. Willenbring, as required under the Code section of the attorneys of record of the defendant, filed with the court; and inasmuch as there is no set procedure set out in the Code for moving the court in connection with this section, we have filed what we have entitled Notice of Motion for Transfer of the case for trial back to Honorable William Byrne, so we supplemented that with our motion.

And we request the court at this time to disqualify himself under this section and transfer the case back to the presiding judge, or to another judge.

The Court: Mr. Hankins, as I told you earlier, the motion was denied.” [R. T. 2, line 21, to p. 3, line 20].

The court ruled in denying appellant's motion to transfer that the affidavit of bias was not timely filed [R. T. 4, lines 9 and 10] and insufficient [R. T. 4, line 25].

Thereafter the jury trial took place and appellant was found guilty and sentenced. Appellant found no error in these proceedings.

V. ARGUMENT.

The Trial Court Did Not Err in Its Ruling on Appellant's Affidavit of Bias Filed Pursuant to Section 144 of Title 28, United States Code.

Discussion of the law applicable to affidavits of bias is contained in *Green v. Murphy*, 259 F. 2d 591 (3d Cir. 1958), at p. 593:

“We are of the opinion that the case at bar is ruled by legal principles which, although they may have been cloudy in the past, are now clearly defined. It is now settled law that the judge against whom an affidavit of bias and prejudice is filed under Section 144, must himself pass on the legal sufficiency of the facts alleged and that in so doing he must accept the allegations of the affidavit as true. A United States district judge therefore possesses the jurisdiction, the power, to pass upon the question as to whether he must withdraw from the case by reason of the allegations of his disqualification contained in the affidavit. This necessarily includes the power to decide the question wrongly as well as rightly. *Behr v. Mine Safety Appliances Co.*, 3 Cir., 233 F. 2d 371, certiorari denied 1956, 352 U. S. 942, 77 S. Ct.

264, 1 L. Ed. 2d 237, rehearing denied 1957, 352 U. S. 976, 77 S. Ct. 353, 1 L. Ed. 2d 329; *In re Greene*, 3 Cir., 1947, 160 F. 2d 517, 518; *Voltmann v. United States Fruit Co.*, 2 Cir., 1945, 147 F. 2d 514, 517. Only what is set forth in the affidavit of bias and prejudice is material to the issue of disqualification. *Berger v. United States*, 1920, 255 U. S. 22, 41 S. Ct. 230, 65 L. Ed. 481. It follows, therefore, that only questions of law are presented by the respondent judge's refusal to disqualify himself. There can be no dispute either in the district court or on appeal as to the truth or falsity of the allegations of the affidavit. . . .”

The judge, before whom the case is pending and against whom the affidavit of bias is filed, must consider for the purpose of passing on the sufficiency and timeliness of the affidavit of bias that all of the allegations of the affidavit are true. Accordingly for the purpose of this appeal the affidavit must be considered in a similar light to determine whether or not the court committed error in denying the relief sought based upon the affidavit.

With merely the question of sufficiency and timeliness in issue, it is unnecessary to go outside of the record as appellant in his brief chooses to do or to call to the court's attention the fact that no error is alleged to have occurred in the trial of this case.

Section 144 of Title 28, United States Code, requires that the affidavit of bias shall state the facts and reasons for the belief that bias or prejudice exists. Paragraph 1 of the affidavit of bias submitted by the appellant [C. T. 66, p. 1, line 24, to p. 2, line 7]

is a statement of preliminary matter not addressed to personal bias or prejudice of Judge Solomon. If the affidavit is sufficient it must rely upon the allegations set forth in paragraph 2 of the affidavit [C. T. 66, p. 2, line 8 to line 23]. In paragraph 2 of the affidavit the appellant states that Judge Solomon had a personal bias or prejudice against him [C. T. 66, p. 2, lines 20-23]. Section 144 requires more than the mere statement. The plain, clear language of the statute requires "the affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, . . ." The allegations "that on February 17, 1961, the United States Attorney's Office called the affiant's attorney, Leonard B. Hankins, and advised him that the case had just been transferred to the Honorable Gus Solomon, Judge of the District Court for trial"; and "that thereafter the affiant's attorney has had two conferences with the Honorable Gus Solomon at which agents for the Government and the Assistant United States Attorney were present" taken separately or together with the entire affidavit, by no stretch of the imagination, imply or support the bare conclusion of personal bias or prejudice against the appellant on the part of the Honorable Gus J. Solomon.

The allegation "that further upon information and belief the affiant states that the Honorable Judge Solomon had a conference with the Assistant United States Attorney regarding this case without the affiant's attorney being present" even when considered for the purpose of the appeal as true, does not support the proposition that the trial judge was personally biased or prejudiced against the defendant. It should be noted that the appellant does not suggest or imply even on

information and belief that any improper conduct took place or that the merits of the case were discussed. Clearly such an allegation by itself or when considered with earlier allegations contained in the affidavit, is insufficient to support the proposition that Judge Solomon was personally biased or prejudiced.

Finally, the allegation "that further upon information and belief the affiant believes that the Honorable Gus Solomon has already made up his mind that the defendant is guilty without hearing all of the evidence of the case"; fails to assert any reason or fact for the bare conclusion. This allegation is not supported by any statements or actions attributed to Judge Solomon which might imply or give rise to such belief.

If the mere statement of a naked belief by the defendant that the trial judge was personally biased against him was sufficient under Section 144, the opportunity for unfettered court shopping by defendants would clearly create an abuse of the privilege for which this remedial statute is created. *Henry v. Speer*, 201 Fed 869 (5th Cir. 1913).

In ruling on a similar affidavit, this court in *Williams v. Pierce County Board of Commissioners*, 267 F. 2d 966 (9th Cir. 1959), stated at page 867:

"Appellant asserts error of the trial judge in failing to disqualify himself after an affidavit had been filed by plaintiff charging the judge with bias. The affidavit stated no facts showing bias. Its conclusions of bias and prejudice were properly disregarded by the judge. Title 28, U.S.C.A. § 144; *Scott v. Beam*, 10th Cir., 122 F. 2d 777, 788."

In *Scott v. Beam*, 122 F. 2d 777 (10th Cir. 1941), cited above with approval by the United States Court of Appeals for the Ninth Circuit, the court in ruling on a similar affidavit stated at page 778: "The statement that the Assistant United States Attorney conferred with the judge during the absence of other attorneys in the case of itself was not a fact showing bias and prejudice."

An earlier ruling by this court in *Wilkes v. United States*, 80 F. 2d 285 (9th Cir. 1935) is helpful in describing the test for sufficiency, at page 289:

"To satisfy the requirements of section 21, the facts stated in the affidavit 'must give fair support to the charge of a bend of mind that may prevent or impede impartiality of judgment.' *Berger v. United States*, 255 U. S. 22, 23, 41 S. Ct. 230, 233, 65 L. Ed. 481. The affidavit must 'assert facts from which a sane and reasonable mind may fairly infer bias or prejudice.' *Keown v. Hughes (C. C. A.)* 265 F. 572, 577. These facts 'should be set out with at least that particularity one would expect to find in a bill of particulars filed by a pleader in an action at law to supplement and explain the general statements of a formal pleading.' *Morse v. Lewis (C. C. A.)* 54 F. 2d 1027, 1032."

Appellant's affidavit is in the light of the test described above patently insufficient.

It would appear that appellant himself at this late date recognizes the insufficiency of the affidavit since in his brief he makes new and additional allegations not contained in the affidavit upon which the trial

court based its ruling, here appealed. These new and additional allegations are outside the record which appellant designated and these new allegations are not for the purpose of this appeal, testing the sufficiency of the affidavit, entitled to be considered as true as are the allegations contained in the affidavit.

Appellant states in his brief at page 5:

“The pre-trial conference was continued on November 20, 1961, with counsel for both parties and appellant in attendance. During the course of this conference Judge Solomon stated directly to appellant, ‘You are the one that is going to the penitentiary.’ [TR 2 and 3]”

Appellant is not supported by the record in the statement he attributes to Judge Solomon. It should also be noted that such a statement was not offered in response to the court’s invitation to counsel to supplement the record on November 21, 1961 [R. T. 2, line 21, to p. 3, line 20]:

“Have you anything to say to supplement the affidavit?”

Mr. Hankins: The only thing I would like the record to show, your Honor, is that we have had two conferences, I believe, with your Honor. One last Saturday morning and one Monday at 2:00 o’clock in your chambers, in which the United States Attorney was present, and one on which the defendant was present, that is, on Monday afternoon; that as a result of my discussion with him of what has transpired, and his being present and knowing what has transpired, he feels that he should, under the Code section, file the Affi-

davit of Bias, under 20 USC 444, and request the court to disqualify itself in this matter.

And as a result of that we have then filed the affidavit of bias and prejudice for Mr. Willenbring, as required under the Code section of the attorneys of record of the defendant, filed with the court; and inasmuch as there is no set procedure set out in the Code for moving the court in connection with this section, we have filed what we have entitled notice of Motion for Transfer of the case for trial back to Honorable William Byrne, so we supplemented that with our motion.

And we request the court at this time to disqualify himself under this section and transfer the case back to the presiding judge, or to another judge.

The Court: Mr. Hankins, as I told you earlier, the motion was denied."

The allegations on information and belief made in the affidavit in the light of the statements of counsel as set forth above should have complied with the tests set forth in *Johnson v. United States*, 35 F. 2d 355 (D. C. W. D. Wash. 1929) at page 357:

"In the last analysis, the statute involved is not concerned with the actual state of mind of the judge or litigant, but only with what the latter is willing to incorporate in an affidavit and counsel to indorse. However false, there can be no denial, but the charge of personal bias or prejudice must be accepted as true. To avoid abuses, the law requires that the affidavit be of legal sufficiency. That is, that the charge be of *personal* bias or

prejudice, that the facts and reasons for the charge be set out and give fair support to the accusation, and that upon its face the affidavit presents evidence of good faith. To that end mere rumors, gossip, general statements that affiant by some person is informed and believes that at some time, some place, some occasion, the judge expressed sentiments manifesting bias or prejudice, are not enough, but informant, and time, place, occasion of, and the judge's expressions, and that the bias or prejudice is *personal*, all must be set out in the affidavit. . . .”

The affiant is silent as to time, place, facts and reasons for the conclusions set forth in his affidavit. Accordingly it is impossible to ascertain whether good cause existed for the filing of the affidavit on the morning of trial rather than on November 17, 1961, or during the intervening days. The affidavit is insufficient in this respect.

In *In re Union Leader Corporation*, 292 F. 2d 381 (1st Cir. 1961), cert. denied 368 U. S. 927, the court made this observation which here seems appropriate:

“In sum, a judge must be presumed to be qualified, and there must be a substantial burden upon the affiant to show grounds for believing the contrary. This is not an undue requirement. If a party cannot present a sufficient affidavit indicating possible bias, he will still have protection if bias or prejudice appear in fact during the course of the trial. Compare *Knapp v. Kinsey*, 6 Cir., 1956, 232 F. 2d 458, with *Killilea v. United States*, 1 Cir., 1961, 287 F. 2d 212, certiorari denied 81 S. Ct. 1933.”

In fairness to the trial court it should be pointed out that Judge Solomon, when confronted with the affidavit, recessed the court and conferred with Honorable Wm. M. Byrne prior to ruling on the sufficiency of the affidavit [R. T. 2], thereby demonstrating laudable impartiality and fair consideration of the affidavit prior to ruling. The trial which followed was without asserted error.

VI.
CONCLUSION.

There being no error, the judgment should be affirmed.

Respectfully submitted,

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No. 1 7 7 8 3

United States
Court of Appeals
for the Ninth Circuit.

ALCUIN WILLENBRING,

Appellant,

v

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

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No. 17783

United States
Court of Appeals
for the Ninth Circuit.

ALCUIN WILLENBRING,

Appellant,

v

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

ARGUMENT

In its Brief on Page eight, the Third Paragraph, the Appellee states, "With merely the question of sufficiency and timeliness in issue," and thereafter discusses at length the sufficiency of the affidavit in question on this appeal. However, Appellee does not further discuss the timeliness of said affidavit except to allege on Page Fourteen, Second Paragraph, that, "....it is impossible to ascertain

whether good cause existed for the filing of the affidavit on the morning of trial rather than on November 17, 1961, or during the intervening days".

Appellee does not further argue the timeliness of the affidavit but on Page 6 of its brief, Appellee quotes from the record [RT. 2,3]¹ the statement of Appellant's Attorney, Leonard B. Hankins, which sets forth therein the fact that only two conferences were had with the Honorable Judge Gus Solomon, one on Saturday and the other on Monday preceding the day of trial, November 21, 1961, a Tuesday. We therefore submit that Appellee, by its silence on this issue and its quotation of facts in support of Appellant's position as contained in his brief [Ap. 10]² is conceding this issue to Appellant and we therefore will not discuss this point further herein.

In its argument Appellee, on Page 12 of its Brief, states that the statement attributed by Appellant to the Honorable Judge Solomon, "You are the one that is going to the penitentiary", is not supported by the record. Appellee again quotes the colloquy taken from the record [RT. 2,3] between Judge Solomon and Appellant's attorney on Pages 12 and 13 of said Brief which concludes, "The Court: Mr. Hankins, as I told you

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1. R.T. denotes Reporter's Transcript;
 2. Ap. denotes Appellant's Brief

earlier, the motion is denied".

The Court's statement at this point shows clearly that the affidavit in question had been discussed at a time prior to the appearance of counsel in the Court Room and it follows that no reporter was present when the extrajudicial remark attributed to Judge Solomon was made as otherwise Appellant would certainly have designated that portion of the record for review. Appellant therefore submits that where a Trial Court alludes to extrajudicial discussions in its ruling on a motion before it, that it is proper for an Appellant in a criminal case to quote the content of such discussion even though such quotation is offered for the first time on appeal.

Appellant has failed to find any authority in support of, or against the argument offered above and therefore begs this Court to consider said argument and the issue presented as one of first impression.

Appellee's Brief at Page 11, cites the case of Scott v Beam, 122 F2d 777 (10th Cir. 1941) wherein it was held that the fact a judge conferred with the Assistant United States Attorney in the absence of other attorneys in the case of itself was not a fact showing bias or prejudice.

Appellant submits that his conclusion as to the existence of bias or prejudice against him on the part of Judge Solomon was not based on a single instance but was arrived at after

Appellant learned that the Honorable Judge Solomon had so conferred with the United States Attorney and thereafter was told by said Judge, "You are the one that is going to the penitentiary" [Ap. 10].

Thus Appellant's position appears clearly to fall within the rule of Nations v. U.S., 14 F2nd 507, C.C.A. Mo. 1926, cited in Appellant's Brief [Ap. 11], providing for transfer of a cause to another judge where a defendant is informed and believes that persons connected with the government and having special interest in the prosecution had communicated to the trial judge what they claimed to be facts and circumstances connected with the charge made in the indictment, as a result of which said judge had formed and expressed an opinion that defendant was guilty.

Further, Appellee's Brief is silent as to a denial of the fact of a conference held by the Assistant United States Attorney with Judge Solomon prior to the day of trial, or the statement attributed to said Judge by Appellant. Rather, Appellee seeks to dismiss one of these facts because it does not happen to be referred to in the record on review and the other because it is not sufficient when standing alone.

Appellee is also silent as to an explanation of the matters discussed with Judge Solomon at the conference held in the absence of Appellant's attorney and yet apparently takes the position in its Brief that there is no basis in fact for a

conclusion as to personal bias or prejudice arising in the mind of Appellant. [Br.9]³ As to members of the legal profession, familiar with the integrity of the judiciary and fellow counsel, such silence is understandably acceptable. However, the layman's mind, particularly when housed in the being of a defendant to a criminal charge, can hardly be expected to react to such conduct on the part of the Trial Court in the same manner as that of the legal practitioner. This is especially true when coupled with such acts by a Judge as a tone of voice, a look or a gesture, that are not capable of factual description but all of which, when considered with known facts, tend to create a mental picture of adversity to one's cause.

Appellant therefore reiterates the position taken in his main Brief [Ap. 11] that instant case falls within the purview of Knapp v. Kinsey, 232 F2d 458, holding that bias or prejudice on the part of a judge may exhibit itself by acts or statements and that as a result the Trial Court erred in failing to disqualify itself.

Appellee's Brief at Page 10, cites the case of Henry v. Speer, 201 Fed. 869 (5th Cir. 1913) in support of the proposition that a sustaining of the affidavit in question would clear the way for "unfettered court shopping" by defendants. A review of the history of the cited case fails to reveal that

3. Br. denotes appelle's Brief

it has ever been cited in other cases for the point attributed to it. Further, a review of the case failed to reveal to the writer that said case was decided on the issue of the claimed rule and in any event the clear wording of the code section involved, 28 U.S.C. 144, limits a defendant to only one such affidavit as is involved herein. We therefore submit that the use of the word "unfettered" is an extreme expression and not truly involved in the point on this appeal.

Appellee, again on Page 10 of its Brief, cites the case of Williams v. Pierce County Board of Commissioners, 267 F2d 866 (cited as 966), (9th Cir. 1959), in support of its contention that affidavits which fail to state facts are insufficient. While a reading of the cited report reveals the quotation to be accurate, yet the report also reveals that the affidavit ruled upon is not contained therein. It is therefore not possible to state whether the affidavit in the cited case was comparable in content with that of the case on appeal, or whether it merely alleged the defendant's mental image of the Trial Court. Instant affidavit is therefore distinguishable from the cited case since Appellant herein alleged the fact of a conference between Judge Solomon and the Assistant United States Attorney in the absence of defense counsel and Appellant's belief that the Honorable Judge Solomon had a personal bias or prejudice against him. The affidavit is further supplemented by the remarks of Appellant's counsel

[Br. 12] when in response to Judge Solomon's request he stated, ".....and his being present and knowing what has transpired.....", thus showing that Appellant had a personal knowledge of events which led to his mental belief.

We therefore submit that instant case cannot be compared with Williams v. Pierce County Board of Commissioners, supra, in the absence of the affidavit there involved and further inasmuch as the report of said case states that the affidavit therein was not properly executed and therefore could not be considered as such.

Appellee further cites Johnson v. United States, 35 F2d 355, (D.C.W.D. Wash. 1929), [Br. 13] in support of its contention that an affidavit of bias should contain the time, place, occasion of, and the Judge's expressions, leading to the conclusion of personal bias or prejudice. A review of the history of the cited cases reveals only five (5) instances where it has been cited, in one of which the writer failed to find mention of the case and in another it was not cited for the point attributed to it by Appellee herein.

As opposed to the above case, Appellant offers as authority the case of Nations v. U.S., C.C.A. Mo. 1926, 14 F2d 507, cited in his main Brief [Ap. 11], as controlling on the issue of the degree of exactness required in an affidavit of bias. In said case in commenting on the need for exact quotations, time and place of utterance, the Court stated at

Page 509:

"Such details, if set out, might be-taken verity in the affidavit if it were subject to attack. The affidavit, however, is not subject to attack, but is to be taken as true. And in any event the judge against whom the affidavit is filed cannot pass upon the truth or falsity of it. Berger v United States, Supra. The affidavit clearly states that defendant has received certain specified, definite information, which defendant believes to be true. If true, it would lead to the reasonable conclusion that the judge had a bias or a prejudice against defendant. Facing a false affidavit stand the penalties of perjury. Facing a false certificate of counsel stands the penalty of disbarment. The affidavit and the certificate are to be taken at their face value."

Appellant herewith reiterates his position taken in his main Brief [Ap. 12], that the ruling of Judge Solomon was not based on his conclusion as to the legal sufficiency of the affidavit, but rather because he believed it had been submitted only for purposes of delay.

Appellee's Brief makes no mention of Appellant's third issue [Ap. 13] and therefore no further discussion of this

point will be undertaken here.

For the foregoing reasons as well as those set forth in the Appellant's main Brief, it is respectfully submitted that the decision of the District Court of the United States be reversed.

Respectfully submitted,

LEONARD B. HANKINS

and

JAMES L. HAY

Attorneys for Appellant.

By: S/Leonard B. Hankins

CERTIFICATE OF SERVICE

It is hereby certified that service of three (3) copies of this Brief has been made on opposing counsel by mail in accordance with the rules of the United States Court of Appeals for the Ninth Circuit.

Dated: May 28, 1962

S/Leonard B. Hankins

Leonard B. Hankins



